DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-400	
Title	Vincent E. Staub, Petitioner v. Proctor Hospital
Docketed	October 5, 2009
Lower Ct.	United States Court of Appeals for the Seventh Circuit
Case Nos.	(08-1316, 08-2255, 08-2402)
Decision Date	March 25, 2009
Rehearing Denied	April 28, 2009
Questions Presented	

---Date---	--------Proceedings and Orders----------
Jul 22 2009	Motion (09M11) of petitioner for leave to proceed as a veteran filed.
Jul 22 2009	Petition for a writ of certiorari filed. (Response due November 4, 2009)
Jul 29 2009	MOTION (09M11) DISTRIBUTED for Conference of September 29, 2009.
Oct 5 2009	Motion (09M11) of petitioner for leave to proceed as a veteran Granted.
Oct 5 2009	Brief of respondent Proctor Hospital in opposition filed.
Oct 16 2009	Reply of petitioner Vincent E. Staub filed.
Oct 21 2009	DISTRIBUTED for Conference of November 6, 2009.
Nov 9 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Mar 16 2010	Brief amicus curiae of United States filed.
Mar 31 2010	DISTRIBUTED for Conference of April 16, 2010.
Apr 19 2010	Petition GRANTED.
Jun 1 2010	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
Jun 1 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 2, 2010.
Jun 1 2010	The time within which to file respondent's brief on the merits is extended to and including September 1, 2010.
Jul 2 2010	Joint appendix filed.
Jul 2 2010	Brief of petitioner Vincent E. Staub filed.
Jul 9 2010	Brief amicus curiae of United States filed.
Jul 9 2010	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed.
Jul 9 2010	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
Jul 9 2010	Brief amicus curiae of Reserve Officers Association of America filed.
Jul 9 2010	Motion for leave to file amicus brief filed by American Association for Justice.
Jul 14 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 16 2010	Motion for leave to file amicus brief filed by American Association for Justice

	GRANTED. Justice Kagan took no part in the consideration or decision of this motion
Aug 20 2010	CIRCULATED
Aug 24 2010	SET FOR ARGUMENT ON Tuesday, November 2, 2010
Aug 27 2010	Record for U.S.C.A. for the Seventh Circuit is electronic
Aug 31 2010	Brief of respondent Proctor Hospital filed. (Distributed)
Sep 3 2010	Record received from U.S.D.C. for Central District of Illinois
Sep 7 2010	Justice Kagan is recused in this case
Sep 7 2010	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed. (Distributed)
Sep 7 2010	Brief amicus curiae of National School Boards Association filed. (Distributed)
Sep 8 2010	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)
Sep 8 2010	Motion for leave to file amicus brief filed by Equal Employment Advisory Council
Sep 9 2010	Motion for leave to file amicus brief out of time filed by Chamber of Commerce of the United States of America (Distributed)
Sep 30 2010	Reply of petitioner Vincent E. Staub filed. (Distributed)
Oct 4 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion
Oct 4 2010	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States of America out of time GRANTED. Justice Kagan took no part in the consideration or decision of this motion
Oct 12 2010	Motion for leave to file amicus brief out of time filed by Equal Employment Advisory Council GRANTED. Justice Kagan took no part in the consideration or decision of this motion
Nov 2 2010	Argued. For petitioner: Eric Schnapper, Seattle, Wash., and Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Roy G. Davis, Peoria, Ill.

PETITION FOR WRIT OF CERTIORARI

No. 09-400

In The

SUPREME COURT OF THE UNITED STATES

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?

PARTIES

The petitioner is Vincent E. Staub. The respondent, Proctor Hospital, is a subsidiary of Proctor Healthcare, Inc.

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Petitioner Vincent Staub respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on March 25, 2009.

OPINIONS BELOW

The March 25, 2009 opinion of the Court of Appeals for the Seventh Circuit, which is reported at 560 F. 3d 647 (7th Cir. 2009), is set out at pp. 1a-21a of the Appendix. The April 28, 2009 order of the Court of Appeals, denying rehearing and rehearing en banc, which is not reported, is set out at p. 22a of the Appendix. The May 7, 2008 opinion and order of the District Court, which is unofficially reported at 2008 WL 2001935 (C.D.Ill. 2008), is set out at pp. 23a-31a of the Appendix. The August 16, 2007 order of the District Court, which is unofficially reported at 2007 WL 2566259 (C.D.Ill. 2007), is set out at pp. 32a-38a of the Appendix. The February 28, 2007 order of the District Court, which is not reported, is set out at pp. 39a-47a of the Appendix. The August 1, 2006 order of the district court, which is not reported, is set out at pp. 48a-57a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on March 25, 2009. A timely petition for rehearing and rehearing en banc was denied on April 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4311(a) of 38 U.S.C., a provision of the Uniformed Services Employment and Reemployment Rights Act, provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

Section 4311(c) of 38 U.S.C. provides in pertinent part:

> An employer shall be considered to have engaged in actions prohibited (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service . . . .

Section 4303(13) of 38 U.S.C. provides in pertinent part:

> The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty . . . .

STATEMENT OF THE CASE

This case presents the important question described by Justice Alito in his concurring opinion in Ricci v. DeStefano, 129 S.Ct. 2658, 2688-89 (2009): in what circumstances can an employer be held

liable based on the unlawful intent of officials or employees who did not make the formal decision to take the action complained of? Petitioner's claim arose under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the relevant terms of which are essentially the same as Title VII. A jury found that Staub had been dismissed from his job as a hospital technician because of his service in the United States Army Reserves. The Seventh Circuit set aside that verdict and ordered dismissal of the action, reasoning that under the stringent Seventh Circuit standard the unlawful intent of the officials who allegedly brought about Staub's dismissal could not be attributed to the employer. (App. 18a-21a).

Petitioner Staub is a First Sergeant in the United States Army Reserves, in which he has served since 1984. At the time of the events giving rise to this action he was the Noncommissioned Officer In Charge of the Department of Radiology in either the 801st Combat Support Hospital at Fort Sheridan, Illinois, or the 114th Combat Support Hospital at Fort Snelling, Minnesota. His obligations to the Reserves included one weekend a month of drill and an additional training period of two to three weeks each year. Staub was called to active duty in early 2003 in connection with Operation Iraqi Freedom, and served for several months at Ft. Stewart/Ft. Gordon Georgia, instructing Army personnel on how to establish a Radiology unit in a field hospital in a combat environment.

For fourteen years prior to his dismissal Staub was an

angiography technician in the Diagnostic Imaging Department of the Proctor Hospital in Peoria, Illinois. In late 2000 Janice Mulally became the second in command of the Department[1], and she grew increasingly hostile to Staub's service in the Reserves.[2] "Mulally's negative opinion of Staub's military service and the effects of that service is well documented in the record." (App. 55a).[3]

Prior to Mulally's appointment Staub had weekends off, and thus was able without difficulty to meet his obligation to train with his unit one weekend per month.

> Mulally placed Staub back in the weekend rotation, creating conflicts with his drill schedule. Mulally did this even though she had advance notice of Staub's military obligations, and when Staub approached her about the issue she became agitated. . . . Mulally responded to Staub's questions by throwing him out of her office and saying she "didn't want to deal with it."

(App. 4a; see App. 40a, 50a). "[O]ccasionally Mulally made Staub use his vacation time for drill days or scheduled him for

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[1]"The record shows that the de facto supervisor for the angio techs . . . was Jan Mulally. . . . Mulally was also in charge of scheduling for the department." (App. 49a).

[2]The Statement of the Case summarizes the evidence adduced at trial in support of Staub's claims. There was conflicting evidence regarding many of the important factual allegations. For example, Mulally and Korenchuk (the head of the Department) disputed testimony that they had made remarks and taken actions indicating hostility towards Staub's military service.

[3]There was, the court of appeals acknowledged "abundant evidence of Mulally's animosity" (App. 18a), and at least "part of this animus flowed from [Staub's] membership in the military." (App. 8a). See App. 19a (testimony regarding Mulally was "the strongest proof of anti-military sentiment"), 33a (record is "'well documented' that Mulally had negative opinion about Staub's military service").

additional shifts without notice." (App. 4a). "Sometimes Mulally . . . would post a notice on the bulletin board stating that volunteers were needed to cover the drill weekends, portraying Staub as irresponsible." (Id.). Her actions "had the effect of breeding resentment and animosity toward Staub among his co-workers." (App. 50a; see App. 40a).

> Mulally made her reasons plain: She called Staub's military duties "bullshit" and said [having to work] the extra shifts were his "way of paying back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves."

(App. 4a).

> Bad as that was, things became worse in 2003 [when] Staub was called to active duty . . . Staub's return home was less than pleasant. Korenchuk told one of Staub's coworkers, Amy Knoerle, that Mulally was "out to get" Staub. . . . [W]henever Staub approached Mulally about drill obligations, Mulally would roll her eyes and make sighing noises.

(App. 4a-5a).[4]

In July of 2003 Mulally complained to several of her subordinates that Staub's "military duty was a strain on the [] department," and sought assistance to "get rid of him." (App. 5a). In early 2004 Mulally called the administrator of Staub's Army Reserve unit, Joseph Abbidini, to ask if Staub could be excused from some of his military duties. When Abbidini explained that the training was mandatory, Mulally "called Abbidini an 'asshole' and hung up." (App. 8a; see App. 40a-41a, 50a). Mulally scheduled

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[4]The actual testimony was that when Staub attempted to discuss his Reserve obligations with Mulally, she told him to "get the F--- out" and referred to his Reserve duties as "bullshit." (Tr. 312, 315).

Staub to work during every one of his drill duty weekends in 2004, as well as during the period when he was required, in anticipation of being recalled to active duty, to report for soldier readiness training. (Tr. 352).

The head of the Department, Michael Korenchuk, on a number of occasions also expressed hostility to Staub's reserve duties.

> [T]hose comments were none too subtle. Korenchuk characterized drill weekends as "Army Reserve bullshit" and "a b[u]nch of smoking and joking and [a] waste of taxpayers[']money."

(App. 4a). Korenchuk "refused to give Staub additional time necessary for travel when he was training in Minnesota." (App. 50a; see App. 41a). Korenchuk objected that Staub's 2003 call-up had been costly to the hospital, and expressed unhappiness that the call-up anticipated in 2004 would also be expensive for the employer. (Tr. 102-03, 329, 337).

There was also evidence of similar anti-military sentiment on the part of a sometime co-worker, Angie Day. "Day . . . shared Mulally's dislike of Staub." (App. 5a). On occasions when Day was assigned to be "on call" because Staub was on Army Reserve duty, she objected vociferously and refused to accept that assignment. (App. 44a (Day's complaints "linked the 'inconvenience' to Staub's military service"), 56a). Shortly after Proctor hired a new angiography technician, Leslie Sweborg, Day invited Sweborg to a private after-hours meeting with Mulally, who supervised Sweborg and Day as well as Staub. Mulally announced that "[Staub's] military duty had been a strain on the [] department," and asked

Sweborg "to help her get rid of him." (App. 5a).[5] The Magistrate Judge noted that the testimony indicated that there was "a conspiracy to cause Staub to be fired from his job at Proctor." (App. 53a; see App. 33a).[6] In the months that followed, Day provided hospital officials with adverse information about Staub, information which Staub and Sweborg both insisted was untruthful. (App. 8a, 44a).[7]

> Due to her involvement in the alleged conspiracy against Staub, there is a factual question as to whether statements she gave [to hospital officials] were truthful, and also whether those statements tainted the decision makers in Staub's firing with her apparent prejudices.

(App. 56a). At the time when Staub was dismissed, Day was working for Proctor on only an occasional part time basis. "Mulally . . . facilitated Day's rehiring to the angio lab at Proctor, seven days after Staub was terminated." (App. 51a). Day was given the vacancy created by the dismissal of Staub.

The dismissal of Staub was rooted in two incidents in early 2004, the facts of which were hotly disputed. In January 2004--two weeks after Staub informed his supervisors that he was likely to be recalled to active duty--Mulally issued a serious (and

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[5]Sweborg refused. (App. 5a).

[6]The Magistrate Judge noted that there was a factual question as to the truthfulness of statements Day had made to Buck "[d]ue to her involvement in the alleged conspiracy against Staub." (App. 56a).

[7]"While defendant argues that Day played no part in the decision to terminate Staub, to the extent her animosity conveyed misleading information to Buck, it may be attributable to Buck . . ." (App. 44a).

controverted) disciplinary warning to Staub (and Sweborg), asserting that they had improperly failed to assist with diagnostic imaging procedures outside the Angiography Lab. Mulally asserted that at the time in question Staub and Sweborg had no work of their own in the Angiography Lab; Staub and Sweborg testified to the contrary, and pointed to records indicating that a patient was scheduled for and present in the Lab in that period. Mulally contended Staub and Sweborg flatly refused to assist in other procedures; Staub and Sweborg stated that they had done so within a few minutes after their own patient cancelled. Mulally asserted that Staub and Sweborg had violated a standing order that all angiography technicians were to go the general diagnostic imaging unit whenever there was no angiography patient; Staub and Sweborg insisted there was no such order. As a result of this disciplinary warning, Staub (and Sweborg) were ordered never to leave the diagnostic area "unless [he] specified to [Korenchuk] or [Mulally] where and why [he should] go elsewhere." (App. 6a-7a).

The second incident occurred on April 20, 2004, the day Staub was fired[8]; here too the key facts were the subject of conflicting testimony. According to Staub and Sweborg, after working all morning in the Angiography Lab, they finished at lunch time and decided to go to lunch. Mindful of the January warning, they went

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[8]Buck insisted that the incident occurred on the 19th, and that pursuant to her invariable practice she had waited 24 hours before firing Staub. Korenchuk as well as Staub and Sweborg testified that the incident occurred on April 20. The court of appeals, assuming a somewhat unusual role, "f[ou]nd the collective recollection of Staub, Sweborg, and Korenchuk more credible." (App. 9a n. 3).

to Korenchuk's office, but he was not there; Staub then called and left a voicemail on Korenchuk's phone, explaining that he and Sweborg would be in the hospital cafeteria. Staub and Sweborg returned to the Angiography Lab within 30 minutes. Korenchuk told a very different story to Linda Buck, the official who made the formal decision to discharge Staub. Korenchuk assertedly complained to Buck that he had been unable to find Staub all morning, and that Staub had not reported in as directed. (App. 9a-10a). According to Buck, Korenchuk did not mention the explanatory telephone message which he had received. Whether or not Korenchuk's statements to Buck were truthful or complete, once Korenchuk so reported to Buck--and before Staub was told of Korenchuk's accusations--Buck decided to dismiss Staub.

> Korenchuk escorted Staub down to Buck's office . . . , picking up a security guard along the way. . . . [T]he decision to terminate was already made. As Staub walked into the room, Buck handed him his pink slip. The guard then escorted him off the grounds.

(App. 9a-10a).

Staub subsequently filed a grievance contesting his termination, and asserting, inter alia, that the critical January 27 warning directive

> was fabricated by Mulally to get him in trouble. Buck did not follow up with Mulally about this . . . and she did not investigate Staub's contention that Mulally was out to get him because he was in the Reserves.

(App. 11a). "Buck . . . failed to pursue Staub's theory that Mulally fabricated the write-up; had Buck done this, she may have discovered that Mulally indeed bore a great deal of anti-military animus." (App. 20; see App. 10a ("Buck failed to speak with other

angio techs who worked with Staub")).

At trial there was sharply conflicting testimony about many of the relevant facts, including the alleged anti-military remarks of Mulally and Korenchuk, and the events of January 27 and April 20.[9] Proctor "dispute[d] the vast majority of the facts" adduced by Staub. (App. 56a). "[T]he testimony and documentation about who said what to whom was hotly contested." (App. 25a). "There remain[ed] a question of fact about the degree of Mulally's influence." (App. 38a). The magistrate judge who presided over the case observed that "given the testimony about . . . Korenchuk's role . . . it was not inherently unreasonable or improper for the jury to have disbelieved crucial parts of the testimony offered by . . . Buck and . . . Korenchuk." (App. 26a). "The extent to which the decision to terminate's Staub's employment was colored by the negative attitudes of Mulally and Staub's co-workers was . . . a question of fact." (App.33a-34a). These wide ranging factual disputes were fully aired at trial; the jury returned a verdict in favor of Staub. (App. 12a, 23a).[10]

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[9]In denying Proctor's motion for summary judgment, the Magistrate Judge noted that "[t]he evidence presented by the two sides indicates important factual inconsistencies which must be clarified before a jury." (App. 54a).

[10]The jury returned the following verdict:

1. Has Plaintiff proved by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the decision to discharge him?

   Yes.

2. Has the Defendant proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status?

   No.

3. Under the law given you in these instructions, did

The controlling issue on appeal was whether liability could be imposed on Proctor based on the unlawful motives of officials or employees other than Buck. Staub did not contend that Buck herself harbored any animus based on his military service. Rather, Staub argued that Mulally, Korenchuk and Day objected to Staub's weekend and summer Reserve drills and to his active duty Army service. Staub maintained that the actions of Mulally, Korenchuk and Day, including providing inaccurate information to Buck, tainted the decision of Buck, the formal decisionmaker. "The case made it to trial on this theory, where the jury apparently found it convincing." (App. 12a). In the court of appeals, Proctor argued that under controlling Seventh Circuit precedent an employer could only be held liable for the unlawful motives of the formal decisionmaker, or of another individual who so dominated the decisionmaking process as to constitute the "functional decisionmaker."[11]

The court of appeals agreed, holding that any influence the anti-military officials had on Buck was legally irrelevant.

> We were [in prior decisions], and remain to this day, unprepared to find an employer liable based on a nondecisionmaker's animus unless the "decisionmaker" herself held that title only nominally.

(App. 15a). Thus in the Seventh Circuit it is not sufficient for a plaintiff to show that other company officials, acting with an

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the Defendant act willfully in violation of USERRA in discharging Plaintiff?

No.

(Court of Appeals Record, at 102; Judgment, Docket No.104).

[11]Brief of Defendant-Appellant Proctor Hospital, at 15, 17, 18.

unlawful purpose, caused the ultimate decisionmaker to advance--unawares--their illegal motive. The court of appeals ruled that proof of the motives and actions of persons other than the ultimate decisionmaker are legally insufficient--indeed, inadmissible--except in the rare case in which the ultimate decisionmaker was guilty of "blind reliance" on those other improperly motivated individuals. (App. 21a). To succeed under this stringent standard, the court explained, a plaintiff must show that the ultimate decisionmaker was "wholly dependent on a single [tainted] source of information." (App. 15a)(quoting Brewer v. Board of Trustees of University of Illinois, 479 F. 3d 908, 918 (7th Cir. 2008)).

The court of appeals acknowledged that the actions of Mulally, Korenchuk and Day[12] had all played a role in Buck's decision. "Without the January 27 write-up, Day's April 2 complaint, and the event on April 20 . . . Buck said she would not have fired Staub." (App. 10a; see id. ("Buck's testimony made clear that . . . she relied on Korenchuk's input")). But under the Seventh Circuit standard that was insufficient as a matter of law. Rather, the court below held, the defendant immunized itself from liability by adducing testimony by Buck that she had relied in part on sources of information other than those three assertedly biased employees.

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[12]The court of appeals did not discuss Staub's contention that Day too was hostile to Staub's military service. Under the Seventh Circuit's standard it would not have mattered if Day had indeed acted with such an unlawful purpose, because Buck testified that she had relied in part on information that was not connected to Day, Mulally or Korenchuk.

(App. 20a)[13]. The court of appeals therefore held that it was improper to admit any of the evidence that Mulally or Korenchuk harbored animus toward Staub because of his military service. Because under the Seventh Circuit's legal standard the employer was responsible only for Buck's motives, and because Staub had never claimed that Buck herself shared the anti-military animus of the others, the court of appeals overturned the jury verdict, and directed entry of judgment for the defendant. (App. 21a).

Staub filed a timely petition for rehearing en banc. The petition was denied on April 28, 2009. (App. 22a).

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEPLY ENTRENCHED CONFLICT AMONG THE COURTS OF APPEALS REGARDING WHEN AN EMPLOYER MAY BE HELD LIABLE FOR THE UNLAWFUL MOTIVES AND ACTIONS OF AN OFFICIAL OTHER THAN THE FORMAL DECISIONMAKER

As Justice Alito noted in his concurring opinion in Ricci, there is

> an important question of Title VII law that this Court has never resolved--the circumstances in which an employer may be held liable based on the discriminatory intent of subordinate employees who influence but do not make the ultimate employment decision. There is a large body of court of appeals case law on this issue, and these cases disagree about the proper standard.

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[13]Buck testified that she had also considered a number of other matters which were not connected to Mulally, Korenchuk or Day, testimony which the appellate court apparently regarded as both truthful and conclusive. (App. 10a). The termination notice given to Staub at the time of his dismissal made no mention of any of this other information. (Id.).

129 S.Ct. at 2688. That identical question[14] has arisen under a wide variety of federal statutes[15], including in the instant case USERRA, whose relevant provisions are essentially the same as Title VII.[16] The lower courts have uniformly assumed that the applicable legal standard is the same under all of these laws. The Seventh Circuit decision in the instant case applied the standard which that circuit has fashioned for and utilizes in Title VII cases.[17]

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[14]Although in many situations the biased official is a subordinate of the formal decisionmaker, that is not invariably the case. In Kicci, for example, the assertedly biased Mayor was not a subordinate of the formal decisionmaker, the New Haven Civil Service Board.

[15]Parker v. Verizon Pennsylvania, Inc., 309 Fed. Appx. 551, 559 (3d Cir. 2009)(Family and Medical Leave Act); Davila v. Corporacion de Puerto Rico Para La Difusion Publica, 498 F. 3d 9, 17 n. 3 (1st Cir 2007)(Age Discrimination in Employment Act); Jerge v. City of Hemphill, Texas, 80 Fed. Appx. 347, 351 (5th Cir. 2003)(section 1983); Laxton v. Gap, Inc., 333 F. 3d 572, 584 (5th Cir. 2003)(Pregnancy Discrimination Act); Freadman v. Metropolitan Property and Casualty Ins. Co., 484 F. 3d 91, 100 n. 8 (1st Cir. 2007)(Americans With Disabilities Act); Christian v. Wal-Mart Stores, 252 F. 3d 862, 876-78 (6th Cir. 2001)(Title II of the 1964 Civil Rights Act); Roebuck v. Drexel University, 852 F. 2d 715, 727 (3d Cir. 1988)(section 1981); see Back v. Hastings on Hudson Union Free School District, 365 F. 3d 107, 126 (2d Cir. 2004)(Equal Protection); Mullinax v. Texarkana Independent School District, 46 Fed. Appx. 917 (5th Cir. 2002)(First Amendment).

[16]Section 4311(c) provides that under USERRA a plaintiff most show that his or her military service was "a motivating factor in the employer's action." When that showing is made, the burden is on the employer to "prove that the action would have been taken in the absence" of that service. Under section 703(m) of Title VII, a plaintiff must show that race, color, religion, sex or national origin "was a motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m). When that showing is made, the burden is on the respondent to "demonstrate[] that [it] would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 20003-5(g)(2)(B).

[17]App. 13a-18a, 21a (citing Brewer v. Board of Trustees of the University of Illinois, 479 F. 3d 908 (7th Cir. 2007)(Title VII)), 15a-18a (citing Metzger v. Illinois State Police, 519 F. 3d 677

This Court granted certiorari to resolve this issue[18] in BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC, 549 U.S. 1105 (2007).[19] The petitioner in that case, however, moved to dismiss its petition prior to argument. 549 U.S. 1334 (2007). The instant case presents an excellent vehicle for resolving this longstanding and important question.

This issue has been repeatedly addressed by all twelve of the geographic circuits.

> One standard is whether the subordinate "exerted influence[e] over the titular decisionmaker." Russell v. McKinney Hosp. Venture, 235 F. 3d 219, 227 (C.A.5 2000); see also Poland v. Chertoff, 494 F. 3d 1174, 1182 (C.A.9 2007) . . . . Another standard is whether the discriminatory input "caused the adverse employment action." See EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, [450 F. 3d 476,] 487 [(C.A. 10 2006)] . . . . The least employee-friendly standard asks only whether "the actual decisionmaker" acted with discriminatory intent, see Hill v. Lockheed Martin Logistics Management, Inc., 354 F. 3d 277, 291 (C.A.4 2004)(en banc).

Ricci, 129 S.Ct. at 2688-89 (Alito, J. concurring).

A. The Functional Decisionmaker Standard

In the Fourth and Seventh Circuits the motives of an official other than the formal decisionmaker cannot subject an employer to

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(7th Cir. 2008)(Title VII)).

[18]The question presented in BCI Coca-Cola was:

> Under what circumstances is an employee liable under federal anti discrimination laws based on a subordinate's discriminatory animus, whether the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee[?]

Petition for Writ of Certiorari, No. 06-341, at i.

[19]The proceedings in the instant case were stayed during the pendency of BCI Coca-Cola. (App. 4a n. 1).

liability unless that official so dominated the decisionmaking process as to be the functional decisionmaker.

The Fourth Circuit holds that an employer ordinarily is legally responsible only for the actions and motives of the "formal decisionmaker,"[20] regardless of whether the action of the formal decisionmaker may have been the direct result of unlawfully motivated actions of other officials. An employer is not liable for the discriminatory acts and motives of officials other than the "formal decisionmaker" "even when such acts or motivations lead to or influence a tangible employment action." Hill v. Lockheed Martin Logistics Management, Inc., 354 F. 3d 277, 287 (2004)(en banc). Even if a supervisory official acting with an unlawful purpose actually caused the adverse action complained of, that is insufficient in the Fourth Circuit to support a finding of liability on the part of the employer so long as the formal decisionmaker had no such motive and was unaware of what was going on.[21] In the Fourth Circuit the only circumstance in which liability can be based on actions of officials other than the formal decisionmaker is where the formal decisionmaker gave "blind approval[]" to "a decision, report or recommendation actually made by a subordinate." 354 F. 3d at 290-91.

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[20]354 F. 3d at 289, 290, 291.

[21]See 354 F. 3d at 289 (employer not liable even if biased official "substantially influences an employment decision made by the formal decision-maker"), 291 (actions of biased official not sufficient to support a finding employer liability even if that official "had a substantial influence on the ultimate decision or because he played a role, even a significant one, in the adverse employment decision.")

The Seventh Circuit standard applied in the instant case is essentially similar to that of the Fourth Circuit in Hill. The court below held that liability for actions of persons other than the formal decisionmaker was limited to cases in which there was "blind reliance" on the opinions of others. (App. 21a). In the Seventh Circuit, as in the Fourth, a plaintiff must demonstrate that the formal decisionmaker was "only nominally" the decisionmaker. (App. 15a). The improperly motivated employee must play such a dominant role in the process "as to basically be herself the true 'functional[] . . . decision-maker.'" Brewer, 479 F. 3d at 917 (quoting Little v. Ill. Dept. of Revenue, 369 F. 3d 1007, 1015 (7th Cir. 2004)); see 479 F. 3d at 917-18 (plaintiff must show that improperly motivated official was "the functional decisionmaker[]."). Under this avowedly stringent standard attempts to impose liability based on the motives of any official other than the formal decisionmaker are "usually ineffective." Metzger v. Illinois State Police, 519 F. 3d 677, 682 (7th Cir. 2008). The very fact that the demonstrated unlawful purposes and actions were those of an official other than the formal decisionmaker "is ordinarily fatal." 519 F. 3d at 682. This Seventh Circuit functional decisionmaker standard typically requires evidence that the formal decisionmaker was "by virtue of her role in the company, totally dependent on another employee to supply the information on which to base that decision." 369 F. 3d at 918. Thus in the instant case the dispositive circumstance that protected Proctor from liability was that the formal decisionmaker,

Buck, testified that she considered at least some information that did not come from Mulally, Korenchuk or Day. (App. 20a). Under the Seventh Circuit standard it was legally irrelevant whether Buck's decision may in fact have been caused by improperly motivated actions from those individuals, who allegedly provided Buck (directly or indirectly) with a wealth of inaccurate information, while withholding critical exculpatory information about Staub.

B. The Causation Standard

In the Sixth, Ninth, Tenth and Eleventh Circuits unlawfully motivated actions by persons other than the formal decisionmaker provide a basis for employer liability if those actions caused the decision of the formal decisionmaker.

The Sixth Circuit imposes liability if the action of a biased official caused the action of the formal decisionmaker. In Madden v. Chattanooga City Wide Service Department, 549 F. 3d 666 (6th Cir. 2008), for example, the Sixth Circuit upheld a judgment against the employer despite the fact that the plaintiff had been dismissed by an unbiased formal decisionmaker who relied on the report of a second unbiased independent investigator. The requisite "causal nexus" was established by proof that a third official, the plaintiff's supervisor, had withheld important exculpatory information from the other two officials.[22]

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[22]The district court, following a bench trial, concluded that racial discrimination tainted the decision because the third official had chosen "to inform senior management about [the black

> [Plaintiff] presented sufficient evidence from which a reasonable factfinder could find a causal nexus between the ultimate decisionmaker's decision to terminate [the plaintiff] and his superior's discriminatory animus.

549 F. 3d at 677. Similarly, in Wilson v. Stroh companies, Inc., 952 F. 2d 942 (6th Cir. 1002), the Sixth Circuit held that a black plaintiff dismissed after having been reported for misconduct by his assertedly biased supervisor could establish that the supervisor's

> racial animus was a cause of the termination . . . [with] evidence that [the supervisor] had not reported such misconduct from white employees.

952 F. 3d at 946. In Simpson v. Diversitech General, Inc., 942 F. 2d 156 (6th Cir. 1991), the Sixth Circuit ordered judgment for the plaintiff who had been fired as a result of the cumulative effect of three disciplinary incidents; the asserted biased supervisor was involved in only the second of those incidents.

> [The fact that the biased supervisor] played no role with regard to Simpson's dismissal does not end the inquiry. . . . If [the biased supervisor] initiated the disciplinary action leading to Simpson's dismissal due to Simpson's race, simply showing that [that supervisor] had no role in the "final" decision to terminate him is insufficient . . . As the evidence revealed that [that supervisor] disciplined Simpson [in the second incident] because of his race and that [the second incident] led substantially to Simpson's dismissal, the fact that [the supervisor] did not "pull the trigger" is of little consequence.

945 F. 3d at 160.[23]

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plaintiff's misconduct] while not informing senior management about white employees [who had done the same thing]." 549 F. 3d at 677 (quoting district court opinion).

[23]The Sixth Circuit applied the same standard in Johnson v. Kroger Co., 319 F. 3d 858 (6th Cir. 2003).

> [The allegedly biased official] not only supervised

In the Ninth Circuit a plaintiff also must show that improperly motivated actions by a non-decisionmaker caused the decision of the formal decisionmaker. In a retaliatory termination case, for example, an employer "cannot use the nonretaliatory motive of a superior as a shield against liability, if that superior never would have considered a dismissal but for the subordinate's retaliatory conduct." Gilbrook v. City of Westminster, 177 F. 3d 839, 854 (9th Cir. 1999).

> The causation issue . . . is purely factual; did retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence? It is not necessary that the improper motive be the final link in the chain of causation.

Id. (quoting Professional Ass'n of College Educators v. El Paso County Community College District, 730 F. 2d 258, 266 (5th Cir. 1984)). Proof of that causation can be based on evidence that the biased official initiated the investigation of the plaintiff[24], provided adverse information about him, gave the decisionmaker

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> Johnson on a daily basis, but also spoke with [the formal decisionmaker] about the problems she identified . . ., assisted [the decisionmaker] in preparing Johnson's performance review . . . , nd consulted with [the decisionmaker] prior to her uli mate decision . . . . Based upon these facts, we conclude that a jury could reasonably find that [the allegedly biased official] played a significant role in the [formal decisionmaker's] decisionmaking process . . . [and] that Johnson would not have been discharged but for his race.

319 F.3d at 868-69.

[24]Where a plaintiff relies on proof that the biased official was responsible for the initiation of the process which led to the action complained of, the plaintiff must also adduce evidence that that official was also in some way involved in, or influenced, the subsequent decisionmaking process. Poland v. Chertoff, 494 F. 3d 1174, 1182-83 (9th Cir. 2007).

adverse documents or a list of witnesses, "compared notes" with the decisionmaker after the plaintiff was interviewed, or suggested that the standards to be applied be altered in a manner adverse to the plaintiff.[25]

The Tenth Circuit also permits a plaintiff to establish liability by demonstrating that the actions of the biased official caused the action complained of.

> To prevail on a subordinate bias claim, a plaintiff must establish more than mere "influence" or "input in the decisionmaking process." Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action.

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 487 (10th Cir. 2006). In establishing causation under the Tenth Circuit standard, a plaintiff is not required to show that the biased official utilized any particular tactic to bring about the action in question. In BCI itself, for example, the court of appeals overturned a district court decision which had assumed that the biased official must specifically have recommended the adverse action; in that case the biased official assertedly had brought about the dismissal of the victim by providing false information to the formal decisionmaker. 450 F. 3d at 488, 492; see id. (causation by "selective reporting or even fabricating information

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[25] Poland v. Chertoff, 494 F. 3d 1174, 1183 (9th Cir. 2007); Dominquez-Curry v. Nevada Transportation Dept., 424 F. 2d 1033, 1040 (9th Cir. 2005); Bergene v. Salt River Agricultural Improvement District, 272 F. 3d 1136, 1141 (9th Cir. 2001); Olstad v. Oregon Health Science University, 327 F. 3d 876, 883 (9th Cir. 2003); Gillbrook v. City of Westminster, 177 F. 3d at 853; Perez v. Curcio, 841 F. 2d 255, 258 (9th Cir. 1988).

in communications with the formal decisionmaker"); Flitton v. Primary Residential Mortgage, Inc., 238 Fed. Appx. 410, 418 n. 5 (10th Cir. 2007) ("persuad[ing]" the formal decisionmaker). The fact that the formal decisionmaker had also relied in part on information from other sources in the personnel file of the asserted discrimination victim does not preclude a finding of causation. BCI, 450 F. 3d at 492-93.

The Eleventh Circuit applies a similar standard. Where, for example, a biased official recommended that the plaintiff be dismissed, the

> discharge recommendation . . . may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge. . . . [T]he plaintiff must prove that the discriminatory animus behind the recommendation, and not the underlying employee misconduct identified in the recommendation, was an actual cause of the other party's decision to terminate the employee.

Stimpson v. City of Tuscaloosa, 186 F. 3d 1328, 1331 (11th Cir. 1999).

> One way of proving that the discriminatory animus behind the recommendation caused the discharge is under the "cat's paw" theory. This theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation without independently investigating the complaint against the employee.

186 F. 3d at 1332 (emphasis added). But proof that the formal decisionmaker acted as a mere conduit of the purposes of the improperly motivated official is not the only way to establish liability in the Eleventh Circuit.

C. The "Influence" Standard

The rule in six circuits is that proof that an unlawfully motivated official influenced or played a role in the decisionmaking process is sufficient to impose liability on the employer.

In the First Circuit a plaintiff can prove discrimination by showing "that discriminatory comments were made by . . . those in a position to influence the decisionmaker." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F. 3d 46, 55 (1st Cir. 2000). The requisite showing of influence does not require that the biased official have become the de facto decisionmaker. For example, in Mulero-Rodriguez v. Ponte, Inc., 98 F. 3d 670 (1st Cir. 1996), the fact that the employer had given a biased official special responsibilities was deemed to support an inference that that official was "in a position to influence [the] decisionmaking." 98 F. 3d at 676. In Horney v. Westfield-Gage Co., Inc., 77 Fed. Appx. 24, 31 (1st Cir. 2003), the court concluded that an allegedly biased official was "in a position to influence the decisionmaker" simply because he was the plaintiff's "immediate supervisor." In the First Circuit a plaintiff may establish that a decision was tainted by unlawful influence by a showing "that management relied on biased information from an employee who demonstrably possessed a discriminatory animus." Davila v. Corporacion de Puerto Rico Para La Difusion Publica, 498 F. 3d 9, 17 n. 3 (1st Cir. 2007); see Freadman v. Metropolitan Property and Casualty Ins. Co., 484 F. 3d 91, 100 n. 8 (1st Cir. 2007) ("decision maker fed biased information

by discriminatory underlings"); Azimi v. Jordan's Meats, Inc., 456 F. 3d 228, 248 n. 8 (1st Cir. 2006)("neutral decisionmaker . . . induced to act based on inaccurate information provided because of the provider's discriminatory animus"). In the First Circuit, unlike the Seventh, a plaintiff need not show that the assertedly biased official was the sole source of adverse information, but need only demonstrate that such tainted information might have influenced the ultimate decision.

In the Second Circuit employer liability may be based on evidence that a biased official had "influence" on or a "meaningful role" in the decisionmaking process.[26] Proof that the biased

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[26]In Holcomb v. Iona College, 521 F. 3d 130 (2d Cir. 2008), the Second Circuit held that liability could be imposed on the defendant because a recommendation unfavorable to Holcomb had been made by an allegedly biased official (Brennan) to one of the four decisionmakers.

> [A] reasonable jury could . . . find that Brennan . . . possessed a racial motive to discriminate against Holcomb. . . . [A] reasonable jury could conclude that the decision to terminate Holcomb was influenced by Brennan . . . . The college contends that . . . it was Brother Liguori, rather than Brennan . . . , who actually made the decision. . . . Here, there is ample evidence from which a reasonable jury could infer that Brennan . . . played a meaningful role in the decision to terminate Holcomb. Brennan himself testified that he told Brother Liguori that [another worker should be retained instead of Holcomb].

521 F. 3d at 142-43; see Cotarelo v. Village of Sleepy Hollow Police Department, 460 F. 3d 247, 253 (2d Cir. 2006)(assertedly unconstitutional motives of mayor irrelevant where there was no evidence the Mayor "influenced . . . any employment decisions about Cotarelo"); Back v. Hastings on Hudson Union Free School District, 365 F. 3d 107, 125 26 (2d Cir. 2004)("the individual shown to have the impermissible bias played a meaningful role in the process"; formal decisionmaker's actions were "admittedly influenced" by the assertedly biased worker); Bickerstaff v. Vassar College, 196 F. 3d 435, 450 (2d Cir. 1999)("a meaningful role in the promotion process").

official provided the formal decisionmaker with a recommendation or inaccurate information satisfies this "influence" standard.[27] Unlike the Seventh Circuit, in the Second Circuit that information need not be the only source of information available to the formal decisionmaker. The material provided by the biased employee need only "taint[] the pool of information." Back v. Hastings on Hudson Union Free School District, 365 F. 3d 107, 126 n. 18 (2d Cir. 2004). Unlike the Seventh Circuit, the Second Circuit does not require that the tainted material constitute the entire pool. Thus in Back allegedly unfounded criticisms of the plaintiff were sufficient to establish employer liability even though the formal decisionmaker stated that he had relied on that information only "in part." 365 F. 3d at 126.[28] Indeed, in the Second Circuit liability can be based on evidence that an assertedly biased employee influenced the formal decisionmaker by affecting the conduct of a third party who in turn affected that decisionmaker. Id. at 116, 126 (assertedly biased school principal and human resources director influenced school superintendent who prompted

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[27]Back, 365 F. 3d at 126 (recommendation, "very negative final evaluation", "accusations of poor performance"); Holcomb, 521 F. 3d at 143 (recommendation that another worker be retained instead of plaintiff); Rose v. New York City Board of Education, 257 F. 3d 156, 158 (2d Cir. 2001)("unsatisfactory evaluation" and recommendation that plaintiff be terminated).

[28]In Back the School Superintendent who made the critical decision to recommend termination had repeatedly received information from the plaintiff's attorney. The panel that upheld that recommendation received information from the plaintiff's union. 365 F. 3d at 116. In Rose, in addition to the adverse evaluation from an allegedly biased official, the formal decisionmaker itself also had reviewed "various complaints regarding [the plaintiff's] performance." 257 F. 3d at 159.

parents to write letters of complaint relied on by review panel).

The Third Circuit has long held that liability may be based on a showing that a biased employee had an influence on the formal decisionmaker. "Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision." Abramson v. William Paterson College of New Jersey, 260 F. 3d 285, 286 (3d Cir. 2001); see Kant v. Seton Hall University, 279 Fed. Appx. 152, 159 (3d Cir. 2008)(approving jury instruction permitting inference of retaliation if "individuals involved in the . . . process at later stages reviewed, considered, and were influenced by the earlier evaluation"). In Roebuck v. Drexel University, 852 F. 2d 715 (3d Cir. 1988), the plaintiff had been denied tenure by the university's vice president following a series of divergent recommendations by two committees, a department chair and a dean. The Third Circuit held that bias at any stage in the process could support the jury's finding of liability.

> [A] plaintiff need not prove intentional discrimination at every stage of the review process. It is true that University guidelines and witness testimony support Drexel's claim that each successive evaluator performed a de novo review of Roebuck's candidacy. Nevertheless, it is also uncontroverted that at each stage of the process the evaluator had available and considered the reports and recommendations of each previous evaluator. . . . . Hence it plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision.

852 F. 3d at 727 (emphasis in original). In Roebuck and Abramson the final formal decisionmaker manifestly was not limited to a single source of information; in both cases there was a wealth of

information from other sources, including in both instances detailed committee reports favorable to the plaintiff. Roebuck, 852 F. 3d at 721-22; Abramson, 260 F. 3d at 268-71.

In the Fifth Circuit,

> [i]f the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker.

Russell v. McKinney Hospital Venture, 235 F. 3d 219, 226 (5th Cir. 2000). That Fifth Circuit standard is palpably less stringent than the Fourth and Seventh Circuit rule; it clearly does not require, for example, proof that the biased workers were the sole source of the information relied on by the formal decisionmaker. In Gee v. Principi, 289 F. 3d 342 (5th Cir. 2002), the court of appeals held that this standard was satisfied by proof that there were two biased officials among the six officials who provided information about the plaintiff. 289 F. 3d at 344, 345-7, 350. In Laxton v. Gap, Inc., 333 F. 3d 572 (5th Cir. 2003), the plaintiff was dismissed as the result of three disciplinary actions. The allegedly biased official was the key actor in the first of those actions, was the "primary"--but not the exclusive--source of information about the second, and played no role at all in the third and last. The court of appeals upheld a finding of liability on that showing, reasoning that those circumstances were "sufficient evidence to enable the jury to conclude that [the biased official] influenced . . . the individuals principally

responsible for the adverse employment action." 333 F. 3d at 584.[29]

In the Eighth Circuit employer liability also can be based on a showing that a biased official had a degree of influence on the disputed decision.[30] In Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051 (8th Cir. 1993), the court of appeals upheld a finding of liability even though unbiased independent officials had investigated the plaintiff's alleged misconduct and ordered his dismissal. 990 F. 3d at 1055. The biased official had influenced the process by withholding important exculpatory information, referring the investigation to a unit which was more likely to order dismissal, and failing to assist the plaintiff. 990 F. 3d at 1057-59. In Jiles v. Ingram, 944 F. 2d 409 (8th Cir. 1991), the Eighth Circuit affirmed a judgment that the plaintiff had been fired because of his race, despite the fact that the termination

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[29]In Palasota v. Haggar Clothing Co., 342 F. 3d 569 (5th Cir. 2003), the Fifth Circuit held that biased statements by two company officials was admissible and probative of discrimination because they "in a position to influence the decision." 342 F. 3d at 578. In Palasota there was no specific evidence regarding the actions or role of the assertedly biased officials; the court of appeals held that it was sufficient evidence of potential influence that those officials were "members of upper management." Id.

[30]Qamhiyah v. Iowa State University, 566 F. 3d 733, 743 (8th Cir. 2009) (controlling issue is whether "any such discrimination . . . influenc[ed] the . . . final decision"); Okruhlik v. University of Arkansas 395 F. 3d 872, 880 (8th Cir. 2005) (standard is whether a jury could "reasonably 'conclude that [action of another official], if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision.'"); Dedmon v. Staley, 315 F. 3d 948, 950 (8th Cir. 2003) (question is whether allegedly biased official exercised "influence or leverage over [the formal decisionmaker's] decision").

decision had been made by unbiased officials after two hearings at which the plaintiff was permitted to call witnesses and a review of the plaintiff's personnel file. 944 F. 3d at 412-13. The biased official had influenced that decision by "contriv[ing] the . . . incident" for which the plaintiff was fired, and lying about what had occurred. 944 F. 3d 411, 413.[31]

The District of Columbia Circuit applies a similar standard.

> [E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence. . . . "[A]n employer cannot escape responsibility for [] discrimination . . . when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of [a protected class of] workers."

Griffin v. Washington Convention Center, 142 F. 3d 1308, 1312 (D.C.Cir. 1998) (quoting Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F. 3d 1316, 1323 (8th Cir. 1994)). In concluding that the formal decisionmaker was not "insulated from" the assertedly biased

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[31] In Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F. 3d 1316 (8th Cir. 1994), the court of appeals held that liability could be imposed on an employer because a biased supervisor had "set Stacks up to fail by . . . refusing to offer her any assistance [when she] needed help." 27 F. 3d 1325-26.

In Excel Corporation v. Bosley, 165 F. 3d 635 (8th Cir. 1999), in which a woman worker had been fired for shoving a male worker, the Eighth Circuit upheld a jury verdict of sex discrimination because the incident was the result of provocation by a male worker, who insistently showered gender based verbal abuse on the plaintiff while refusing to leave her work station, and by the refusal of a supervisor to permit the plaintiff herself to escape the abuse by leaving that area. 165 F. 3d at 637-38.

> When an employee is fired because she acted to defend himself against harassment, which supervisors failed to take reasonable measure to prevent or correct, the termination cannot be said to be free from discrimination. . . . This is so even if the ultimate decision maker was moved purely by legitimate concern about personnel matters.

165 F. 3d at 639.

official, the court of appeals in Griffin noted that the biased official had denied the plaintiff needed training, designed the test used to assess her skills, and provided the decisionmaker with some--but not all--of the information relied on to fire the plaintiff. 142 F. 3d at 1311-12.

II. THE INTER-CIRCUIT CONFLICT IS WIDELY RECOGNIZED

The inter circuit conflict described by Justice Alito in Ricci has long been widely recognized. In Hill the Fourth Circuit expressly declined to follow the standards in other circuits, objecting that those circuits "have not always described the theory in consistent ways" and that there were "varying applications of the cat's paw or rubber stamp theory as employed in our sister circuits." 354 F. 3d at 290. The dissenting opinion in Hill noted that the narrow standard adopted by the majority in that case conflicted with decisions in the First, Second, Third, Fifth, Sixth, Eighth, Ninth and District of Columbia Circuits. 354 F. 3d at 303 (Michael, J., dissenting)(citing cases).

In Poland v. Chertoff, 494 F. 3d 1174 (9th Cir. 2007), the Ninth Circuit rejected the rule in the Fourth and Seventh Circuits that an employer is liable only if the formal decisionmaker was duped into acting as the mere "cat's paw" of the biased official.

> The [defendant] urges that we should impute a subordinate's animus to his or her employer only in cases in which the subordinate dominates the investigatory process and the final decision is a perfunctory approval of the biased subordinate's inclination. Courts have termed this narrow standard the "rubber stamp" or "cat's paw" approach. . . . See Hill v. Lockheed Martin Logistics Mgmt., Inc. . . . . No doubt an employer is

> liable for discriminatory acts of a subordinate in cases where the subordinate is, as a practical matter, the actual decisionmaker. See Shager v. Upjohn Co., 413 F. 3d 398, 405 (7th Cir. 1990). But liability should not be limited to those cases only. . . . A more expansive approach to subordinate bias liability is called for in subordinate bias cases.

494 F. 2d at 1182.

The Tenth Circuit in BCI Coca-Cola rejected both the functional decisionmaker and the influence standards. Under the functional decisionmaker standard, it objected,

> the decisionmaker must be a "cat's paw" so completely beholden to the subordinate "that the subordinate is the actual decisionmaker." [Hill, 354 F. 3d] at 290. . . . The Fourth Circuit's peculiar focus on "who is a 'decisionmaker' for purposes of discrimination actions," Hill, 354 F. 3d at 286, seems misplaced. The word "decisionmaker" appears nowhere in Title VII. . . . The . . . standard . . . allow[s] employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker.

450 F.3 d at 486-87. The influence standard applied in other circuits, the Tenth Circuit argued, was also improper:

> Some courts take a lenient approach, formulating the inquiry as whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker." See Russell, 235 F. 3d at 227. . . . This standard apparently contemplates that any "influence," the reporting of any "factual information," or any form of "other input" by a biased subordinate renders the employer liable so long as the subordinate "may have affected" the employment action. Such a weak relationship between the subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation.

450 F. 3d at 486-87.

Federal district courts have frequently noted this division among the courts of appeals.

> The "subordinate bias" theory has been recognized by all the circuit courts that have considered the issue, but a circuit split exists as to the proper standard . . . . The circuit courts have applied at least three distinct approaches in implementing the "subordinate bias" theory.

Forozesh v. Lockheed Martin Operations Support, Inc., 2006 WL 2924789 at *3 (W.D.Pa. 2006).

> [T]he standards advanced in the various Circuit Courts of Appeals range from a "lenient approach," in which the question is only whether the subordinate possessed leverage, or exerted influence, to a more restrictive approach, in which an employer . . . can only be liable if the decisionmaker was so completely beholden to the subordinate that the subordinate was the actual decisionmaker.

Coe v. Northern Pipe Products, Inc., 589 F. Supp. 2d 1055, 1090 (N.D. Iowa 2008). That inter-circuit conflict has been the subject of extensive commentary.[32]

III. THE QUESTION PRESENTED ISSUE IS OF EXCEPTIONAL IMPORTANCE

The number and variety of cases in which this issue has arisen amply attest to the importance of the Question Presented. At least

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[32]K. Wong, Weighing Influence: Employment Discrimination And The Theory of Subordinate Liability, 57 Am. U. L.Rev. 1729, 1729-52 (2008); S. Befort, Within The Grasp of The Cat's Paw: Delineating The Scope of Subordinate Bias Liability Under Federal Anti-Discrimination Statutes, 60 S.C.L.Rev. 383, 389-97 (2008); T. Davis, Beyond The Cat's Paw: An Argument For Adopting A "Substantially Influences" Standard for Title VII and ADEA Liability, 6 Pierce L. Rev. 247, 253-57 (2007); Comment, Weighing Influence: Employment Discrimination and The Theory of Subordinate Bias Liability, 57 Am.U.L.Rev. 1729, 1733, 1739-49 (2008); Comment, Controlling The Cat's Paw: Circuit Split Concerning The Level of Control A Biased Subordinate Must Exert Over The Formal Decisionmaker's Choice To Terminate, 48 Santa Clara L. Rev. 1069 (2008); Comment, How Much Power Should Be In The Paw? Independent Investigations and The Cat's Paw Doctrine, 40 Loy. U. Chi. L. J. 141, 153-73 (2008); Comment, Independent Investigations: An Inequitable Out for Employers In Cat's Paw Cases, 80 U.Colo.L.Rev. 255, 260-73 (2009).

where a potential dismissal is involved, most major employers today utilize a personnel process in which several different officials are involved in initiating the disciplinary process, providing information, offering recommendations, and making the formal, ultimate decision. "[M]any companies separate the decisionmaking function from the investigation and reporting functions, and . . . bias can taint any of those functions." BCI Coca-Cola, 450 F. 3d at 488. The extent to which employers can be held liable for the actions and motives of officials other than the formal decisionmaker is thus of great practical significance.

The Seventh Circuit's stringent "functional decisionmaker" standard, like the Fourth Circuit's "actual decisionmaker" requirement, effectively legalizes unlawful action in all phases of such a decisionmaking process except the very last stage. If one official initiates disciplinary action for an illegal reason, a second provides inaccurate information for an invidious purpose, and a third recommends dismissal because he dislikes employees who are white, non-white, female, over 40, disabled, or serve in the Army Reserves, the victim of this scheme will almost never have a remedy in the Seventh or Fourth Circuit so long as yet a fourth official, who makes the ultimate decision, remains blissfully ignorant of the illicit motives of his or her colleagues. The decision below is a palpable invitation for evasion of federal employment laws.

The EEOC correctly observed in its brief in Hill that the interpretation of Title VII in that case "would leave much actual

discrimination unabated."[33] A district judge in the Fourth Circuit candidly acknowledged that that circuit's stringent limitation on employer liability "has the unfortunate potential to create a safe harbor for workplace discrimination by any prejudiced supervisor who can fairly be described as not being the final decisionmaker on personnel decisions." Sawicki v. Morgan State University, 2005 WL 5351448 at *7 (D.Md. 2005). As the instant case well illustrates, the resulting safe harbor can protect as well schemes to violate any number of other federal employment statutes.

The United States correctly pointed out in its merits brief in BCI Coca-Cola v. EEOC that the stringent standard applied by the Fourth Circuit--and in this instance by the Seventh Circuit--is inconsistent with the well-established rules of agency law. Congress enacts all federal employment statutes against the backdrop of traditional common law agency principles, which impose liability on an employer for actions taken by an official or other employee within the scope of his or her employment.

> Consistent with those established principles, when an employer delegates authority to a supervisor to engage in customary employment responsibilities--e.g., to assign work, monitor an employee's performance, decide whether to report a matter for discipline, gather the facts relating to that matter, or make a recommendation on what action should be taken--a supervisor's exercise of that authority falls within the scope of the supervisor's employment.

Brief for Respondent, No. 06-341, at 19. Those agency principles clearly apply to the roles that Mulally and Korenchuk played in the

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[33]Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant, Hill v. Lockheed Martin Logistics Management, Inc., No. 01-1359 (4th Cir.), p. 13.

events leading to Staub's dismissal. The conduct of Bay, assertedly taken in concert with her supervisors, and animated by the belief (however misguided) that Staub's military service was contrary to the interest of the employer, also satisfies those agency standards.

The decision of the Seventh Circuit in the instant case did not even purport to be based on agency principles or on the text and purposes of USERRA. Rather, the decision of the court of appeals turned largely on literary exegesis of a 17th century French fable.

> [I]n this case . . . we try to make sense of what has been dubbed the "cat's paw" theory. The term derives from the fable "The Monkey and the Cat" penned by Jean de la Fontaine (1621-1695). In the tale, a clever--and rather unscrupulous--monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one.

(App. 1a-2a).

> If the decision-maker [Buck] wasn't used as a cat's paw--if she didn't just take the monkey's [Mulally's, Korenchuk's and Bay's] word for it, as it were--then of course the theory is not in play. . . . Buck was not a cat's paw for Mulally or anyone else.

(App. 15a, 21a).

The Tenth Circuit has correctly rejected both this methodology and the standard to which it has given rise.

> [S]ubordinate bias cases have suffered from an abundance of vivid metaphors. The Fourth Circuit, for example, seems to have taken the "cat's paw" metaphor too literally in deriving its total-control-over-the-actual-decision standard. . . . That limitation of subordinate bias claims . . . runs counter to the fairly broad "aided by the agency relation" principle . . . . We see no reason to limit subordinate bias liability to situations that closely resemble the "cat's paw," . . . or other

> metaphors that imaginative lawyers and judges have developed . . . .

BCI Coca-Cola, 450 F. 3d at 488.

IV. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THIS INTER-CIRCUIT CONFLICT

This case presents an ideal vehicle for addressing this longstanding and deeply entrenched conflict. The evidence adduced by plaintiff would readily meet the "influence" standard applied in six circuits; as the court below readily acknowledged, the formal decisionmaker conceded she had "relied on" information from Korenchuk, one of the assertedly anti-military officials. (App. 10a). The plaintiff's evidence would also support a finding of liability in the four circuits that impose liability based on a showing of causation; Buck testified that she would not have fired Staub but for the incidents involving Mulally, Korenchuk and Day. (Id.). The directive that Staub was charged with violating in April 2004 would not have existed but for the January 2004 incident that was assertedly a scheme by Mulally to punish Staub for his military service. Buck would have had no reason to even consider disciplining Staub on April 20 if Korenchuk had not inaccurately told her that Staub had left his job without first notifying his superiors.

This case presents a fully developed factual record, which allows the Court to assess the question presented in a specific, non-abstract setting. The evidence involves several of the most common ways in which a person who is not the formal decisionmaker

may for an unlawful purpose influence or bring about adverse action against an employee: including providing the formal decisionmaker with inaccurate information, withholding exculpatory information from that formal decisionmaker, building a paper record of supposed infractions, and establishing standards of conduct likely to be harmful to the targeted employee.

In the instant case, to be sure, much of this evidence was controverted. The jury before whom the case was tried, however, rejected the employer's contention that it would have fired Staub even if he had not been serving in the Army Reserves. (See n. 9, supra). The only issue in the court of appeals was what legal standard governs when an employer can be held liable for the actions and motives of officials other than the formal decisionmaker. That is precisely the question of law which has long divided the courts of appeals, which this Court granted certiorari to resolve in BCI Coca-Cola, and which Justice Alito described in Ricci.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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OPPOSITION BRIEF

09-400

No. 09-M-11

Supreme Court, U.S.
FILED
OCT 5 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VINCENT E. STAUB,

Petitioner

v.

PROCTOR HOSPITAL,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the
Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals committed reversible error in determining that no reasonable jury could have concluded that the plaintiff was fired because he was a member of the military, where the undisputed facts in the record show that the unbiased decision maker terminated the plaintiff following an independent investigation?

CORPORATE DISCLOSURE STATEMENT

No. 09-M-11

Vincent E. Staub,

Petitioner

v.

Proctor Hospital,

Respondent.

As required by Supreme Court Rule 29.6, Respondent Proctor Hospital states as follows:

(1) Proctor Hospital is a nongovernmental corporation;

(2) Proctor Hospital's parent corporation is Proctor Healthcare Incorporated; and

(3) No publicly held company owns 10% or more of Proctor Hospital's stock.

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STATEMENT OF THE CASE[1]

Respondent, Proctor Hospital ("Proctor"), substantially disputes the facts recited in the Petition because they are incomplete, inaccurate, and in some instances not supported by the record. Proctor submits the following as facts material to the consideration of the question presented.

Proctor is a full-service health care facility serving the residents of Central Illinois. Proctor hired Staub in 1990, at which time he was a member of the United States Army Reserve. (Tr. 285-87.) Staub was employed as an angiography technologist ("angio tech") in Proctor's Diagnostic Imaging Department. The Diagnostic Imaging Department is physically divided into two areas -- one in which traditional diagnostic imaging services are performed (radiology, MRI, ultra sound, mammography, and CAT scan) and another in which angiography services are performed. Angio techs are qualified to work in either area of the Diagnostic Imaging Department. (Tr. 91, 114, 121.)

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[1] The facts stated herein are set forth in the transcript of the trial proceedings and exhibits admitted at trial. References to the transcript are designated "Tr.", references to exhibits admitted by Plaintiff are designated "P. Ex.", and exhibits admitted by Defendant are designated "D. Ex.", followed by the page or exhibit number. Additionally, references to the Petition Appendix are designated by "App." followed by the page number and the letter "a".

The head of the Diagnostic Imaging Department was Michael C. Korenchuk, who reported to Proctor's Vice President and Chief Operating Officer, R. Garret McGowan. (Tr. 515.) Korenchuk was assisted by Jan Mulally, a staff technologist working in MRI who primarily performed mammography and related services. In addition to her clinical work, Mulally performed certain administrative tasks, such as preparing work schedules and assisting with employee evaluations. She had no authority to discharge employees. (Tr. 91-92, 141.)

The events leading to Staub's termination were triggered by concerns raised by Angie Day, another angio tech. In his Petition, Staub attempts to portray Day as a co-worker with military animus. However, Staub's Petition only cites to disputed factual allegations considered in pre-trial motions.[2] None of this purported evidence of military animus was admitted at trial. While evidence was presented that Day disliked Staub, there was absolutely no evidence linking Day's dislike of Staub to his military status. There was simply no evidence of military animus on the part of Day introduced at trial.

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[2] Staub cites to Judge Joe Billy McDade's August 1, 2006 Order on Proctor's first motion for summary judgment, Magistrate Judge John Gorman's February 28, 2007 Order on motions in limine and Magistrate Judge Gorman's August 16, 2007 Order on Proctor's second motion for summary judgment.

On March 26, 2004, Day lodged a complaint against Korenchuk with Linda Buck, the Vice President of Human Resources. Day complained that Korenchuk had been disrespectful of her, chastising her loudly in front of other employees and blowing kisses at her. Day was so upset that she threatened to quit. Upon hearing this, Buck decided that Korenchuk's conduct should be brought to the attention of his boss, McGowan. Buck arranged a meeting between herself, Day, Korenchuk, and McGowan on April 2, 2004. (Tr. 74-76.)

During the April 2 meeting, Day repeated to McGowan her complaints about Korenchuk. Day went on to add that she had also complained to Korenchuk regarding Staub's behavior toward her and that Korenchuk had failed to act on her complaints. Day complained that Staub was unhelpful, abrupt, hard to work with, and would absent himself from the department. (Tr. 50-51.) After an apology from Korenchuk, Day left the meeting. (Tr. 77-78.) McGowan chastised Korenchuk for his conduct towards Day. McGowan then went on to discuss Staub. This was not the first time that McGowan had received complaints about Staub. McGowan had learned from various sources within Proctor that there were issues involving Staub's behavior. (Tr. 78, 517.) In fact, McGowan and Korenchuk had discussed Korenchuk's apparent inability to manage Staub prior to the April 2 meeting. (Tr. 516.) The April 2 meeting ended with McGowan directing Korenchuk to work with Buck to develop a plan of action for dealing with Staub's behavior. (Tr. 78, 518.) There is absolutely no

evidence in the record that McGowan, a four-year veteran who served with the First Marine Division in Vietnam running an intensive care facility in the field, harbored any animus toward Staub on account of his military service. (Tr. 514-15.)

Day's comments at the April 2 meeting were not the first negative reports Buck had heard regarding Staub. Buck began her employment at Proctor in November 2001 and almost immediately began receiving reports critical of Staub's behavior. (Tr. 51.)

- In early 2002, Employment Specialist Mandy Carbiledo told Buck that Cindy Herbold, a recently hired angio tech, quit because she could not work with Staub. Herbold complained that Staub made her "feel like the gum on the bottom of his shoe." (Tr. 52, 67.) No evidence of military animus on the part of Carbiledo or Herbold was presented at trial.

- In November 2002, Nurse Recruiter Sheila Johnson informed Buck that a registered nurse in angiography had quit, and that Johnson had a difficult time recruiting nurses to work there because of Staub's reputation and because people did not want to work with him. (Tr. 67-68.) No evidence of military animus on the part of Johnson was presented at trial.

- Also in 2002, Doneda Halsey, who arranges on-site visits to Proctor for radiology school students, complained to Buck about Staub's

inappropriate flirtatious behavior toward the students. (Tr. 69.) No evidence of military animus on the part of Halsey was presented at trial.

- In January 2004, Brenda Carothers, Proctor's Director of Human Resources, informed Buck that Staub was receiving a written Corrective Action for failing to assist in Diagnostic Imaging. The discipline included a mandate that Staub must remain in Diagnostic Imaging unless he first told Korenchuk and Mulally that he was going elsewhere. While the Corrective Action was drafted by Mulally, it was Carothers who recommended the Corrective Action after she personally investigated the allegations against Staub.[3] (Tr. 57, 73; P. Ex. 17.) Carothers also discussed the matter directly with Staub. (Tr. 347.) No evidence of military animus on the part of Carothers was presented at trial.

Pursuant to McGowan's directive, Korenchuk and Buck decided to meet in Buck's office on the afternoon of April 19, 2004, to develop a plan of action for dealing with Staub's behavior. When Korenchuk arrived, he told Buck that he had just been looking for

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[3] Staub's Petition glosses over this point. Mulally first raised the incident by going to Carothers. Carothers, after completing her own investigation, determined that the discipline was proper. Mulally penned the discipline, but it was Carothers who approved it. (Tr. 57, 73, 161-62.)

Staub and could not find him. Upon hearing this statement, Buck told Korenchuk "I think we need to terminate him." (Tr. 79.) No evidence of military animus on the part of Buck was presented at trial.

However, before terminating Staub, Buck gave herself time to reflect and to review Staub's personnel file. (Tr. 62, 80-81.) The personnel file contained additional examples of Staub absenting himself from the Department and failing to follow directives.

- In 1998, Staub was fired for failure to follow Korenchuk's order that he work past 5 p.m. on June 25, 1998. (D. Ex. 1.)

- Staub grieved his 1998 discharge and was reinstated with conditions, including the following: "You will communicate with your supervisor whenever you are leaving the work area." (D. Ex. 2.)

- Staub's January 2002 evaluation, wherein he was given a "0" or "unsatisfactory" for attitude, advised him to: "Focus more on tasks, less on socializing. Be more of a team player in terms of accessibility/productivity. Stay in the department during paid work hours." (D. Ex. 18.)

- Staub's December 2003 evaluation counseled him to: "be aggressive in his attempt to work throughout the Dept." and "not to go on the defensive when questioned. Angio at Proctor is

also a part of Diagnostic and work needs to be done in both areas." (P. Ex. 32.)

Buck decided to move forward with Staub's termination. She prepared the termination notice to give to him. Korenchuk brought Staub to Buck's office. (Tr. 80-81.) Staub was shown the termination notice and Korenchuk explained to him that he could not find him and he was not where he was supposed to be. Staub protested and gave his explanation of his whereabouts. Buck listened to Staub's explanation. (Tr. 361-63.)

On April 25, 2004, Staub filed a written grievance with Buck protesting his termination. The grievance laid out in detail his version of events regarding: (1) the January 27, 2004 Corrective Action; (2) his actions with regard to assisting Diagnostic Imaging following the Corrective Action; (3) complaints against Mulally pertaining to scheduling; (4) comments made by Day related to covering Staub's drill duty dates; (5) statements made by Korenchuk related to Staub's drill dates, scheduling, and possible deployment; and (6) Mulally's telephone calls to Joseph Abbidinni, a civilian worker for the Army Reserve Center in Bartonville, where Staub had been stationed. (Tr. 81, 363; P. Ex. 28.)

Buck reviewed Staub's grievance, considered Staub's version of events, and investigated his claims that the January 27, 2004 discipline was false. Ultimately, Buck determined that the termination decision should stand and notified Staub of her

decision by letter on May 3, 2004. (Tr. 62-65, 81-84; D. Ex. 59.) On May 5, 2004, Staub filed another grievance directly with Proctor's President and Chief Executive Officer Norman LaConte. (Tr. 363; P. Ex. 27.) However, before LaConte could consider the grievance, Staub filed the instant action in the United States District Court for the Central District of Illinois. (Tr. 520.)

ARGUMENT

I. This Case Is Not A Proper Vehicle For Considering The Appropriate Standard Of Influence Necessary To Impute The Animus Of A Non-Decision Maker To An Employment Decision Because The Resolution Of That Issue Would Not Alter The Outcome Of This Case.

The circuit court disagreement raised in Staub's Petition regarding the standard of influence needed to impute discriminatory animus of a non-decision maker to an employment decision (often referred to as the cat's paw doctrine) is inapposite to the outcome of this case. Even if a different "standard of influence" were applied here, the outcome would still be the same because Buck's independent investigation broke any causal link between Mulally's and Korenchuk's alleged military animus and Staub's termination.

There is no disagreement or split among the circuit courts of appeal regarding the impact that a decision maker's independent investigation has on a plaintiff's ability to impute a non-decision maker's

animus to an employment decision. The circuit courts are in agreement that where a final decision maker bases her decision on an independent investigation, the causal link between a non-decision maker's alleged bias and the employment decision is broken, and the non-decision maker's animus is insufficient to impute liability to the employer. *See, e.g.*, *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 179 (1st Cir. 2008) (no causal connection where "the Separation Review Committee made its own independent decision to terminate Thompson based on the facts of the situation"); *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002) (no causal link between alleged bias of Collins' supervisors and his termination by Transit Authority Board, where Board made decision following evidentiary hearing); *King v. Rumsfeld*, 328 F.3d 145, 153 (4th Cir. 2003) (ruling that evidence of subordinate's bias was irrelevant because decision maker terminated King "after conducting his own independent investigation"); *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) (if decision maker based decisions on his own independent investigation, causal link between alleged retaliatory intent and terminations would be broken); *Wilson v. Stroh Cos., Inc.*, 952 F.2d 942, 946 (6th Cir. 1992) (finding that animus of Wilson's supervisor was not imputed to employer because decision was based on independent investigation); *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908, 919-20 (7th Cir. 2007) (ruling that decision maker conducted independent investigation that absolved employer of liability for any deception on the part of Brewer's supervisor); *Richardson v. Sugg*, 448 F.3d 1046, 1060

(8th Cir. 2006) (animus of athletic director not imputed to employer where decision maker conducted independent review of recommendation to terminate Richardson, and decision maker's own impression of facts provided an independent basis for his decision to approve termination); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640-41 (9th Cir. 2004) ("Vasquez has not shown the necessary nexus because [the decision maker] conducted her own investigation"); *English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001) (ruling that decision maker's attempt to balance allegedly biased investigators' findings with English's own version of events "cuts off any alleged bias on the part of the investigators from the chain of events leading to English's termination"); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (finding no liability where decision maker met with plaintiff and gave her opportunity to explain).

The undisputed facts in this case demonstrate that in terminating Staub, Linda Buck, Proctor's Vice President of Human Resources, received and considered information regarding Staub absenting himself from the Diagnostic Imaging Department and failing to follow directives, from various, unbiased sources other than Mulally and Korenchuk.

First, during the April 2, 2004 meeting, Angie Day informed Buck that Staub would absent himself from the Diagnostic Imaging Department and that he was not helpful, hard to work with, and abrupt. (Tr. 50-51, 77.) As previously discussed in Proctor's

Statement of the Case, despite Staub's best attempts to portray Day as an individual with military bias, there was no evidence admitted at trial demonstrating such.

Second, Garret McGowan, Proctor's Chief Operating Officer expressed concerns about Staub's behavior. McGowan stated to Buck at the April 2, 2004 meeting that he previously had received the same complaints about Staub that Day had made. Staub would absent himself from the Diagnostic Imaging Department and he was not helpful, hard to work with, and abrupt. (Tr. 78.) As a result, McGowan directed Buck and Korenchuk to come up with a plan to address Staub's behavior. (Tr. 78, 518.)

Third, Buck's review and consideration of Staub's personnel file provided her with numerous examples of Staub absenting himself from the Diagnostic Imaging Department and failing to follow directives documented by various, unbiased supervisors and officials of Proctor. (Tr. 62, 80.) That included Staub's termination in 1998 for failure to follow an order, and his reinstatement with conditions such as "You will communicate with your supervisor whenever you are leaving the work area." (D. Ex. 2.)

Additionally, Buck received information from Brenda Carothers, Proctor's Director of Human Resources, pertaining to the events described in the

January 2004 Corrective Action.[4] While Mulally prepared the document, it was Carothers who recommended the issuance of the Corrective Action following her investigation of the allegations against Staub. Carothers spoke to Staub directly about the events set forth in the Corrective Action. (Tr. 57, 345-47.) There is no evidence in the record that Carothers was biased against Staub.

Moreover, during his termination meeting and again in connection with her review of Staub's written grievance, Buck considered Staub's version of the events giving rise to his discharge. She gave him the opportunity to present his side of the story. (Tr. 81, 361-63.) This further illustrates that Buck made an independent decision to terminate Staub. *See, e.g., Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547-48 (7th Cir. 1997); *English*, 248 F.3d at 1011; *Llampallas*, 163 F.3d at 1249.

Simply put, Buck based her termination decision on her own independent investigation of the situation. Ultimately, she independently determined that Staub had a history of both absenting himself from the Diagnostic Imaging Department and failing to follow directives. At no time did Staub's military status enter into Buck's termination decision. The Seventh Circuit Court of Appeals concurred:

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[4] Staub's co-worker Leslie Sweborg, who is not a member of the military, also received a Corrective Action in January 2004 for the same reasons Staub did. (Tr. 74.)

> [T]he evidence established that Buck looked beyond what Mulally and Korenchuk said – remember, Korenchuk supported the firing only "reluctantly" – and determined that Staub was a liability to the company.
>
> * * *
>
> Viewing the evidence reasonably, it simply cannot be said that Buck did anything other than exercise her independent judgment, following a reasonable review of the facts, and simply decide that Staub was not a team player.

(App. 20a-21a.)

Therefore, no matter what "standard of influence" is applied to this case, the outcome will be the same -- Buck's independent investigation broke any causal link between Mulally's and Korenchuk's alleged military animus and Staub's termination. As there is no disagreement among the circuit courts of appeal regarding this issue -- the fact that an independent investigation breaks any causal connection between allegedly biased non-decision makers and the ultimate termination decision -- this case is not the proper vehicle for deciding the appropriate "standard of influence" under the cat's paw doctrine. Therefore, Staub's Petition for Writ of Certiorari should be denied.

II. This Case Presents A Poor Vehicle For Considering The Legal Question Posed Because It Requires An Intricate Study of Salient Details Buried In The Record But Unaddressed By The Petition.

In an effort to entice the Court to take this case, Staub has attempted to present it as a simple, straightforward legal issue involving minimal facts. Such is not the case. There are several hundred pages of trial transcript and numerous exhibits bearing on the subtleties of the alleged cat's paw in this case, many of which have gone unaddressed in the Petition. For example:

- Unaddressed is the fact that Linda Buck received information regarding Staub from Garret McGowan, Proctor's Vice President and COO -- an undisputedly non-biased source.

- Unaddressed is the fact that Linda Buck had information from Employment Specialist Mandy Carbiledo -- an undisputedly non-biased source -- that at least one angio tech had quit because of Staub's attitude and conduct.

- Unaddressed is the fact that Linda Buck had information from Nurse Recruiter Sheila Johnson -- an undisputedly non-biased source -- that another employee had quit, and that Johnson generally had trouble recruiting employees for angiography, because of Staub's attitude and conduct.

- Unaddressed is the fact that Linda Buck had received complaints from Doneda Halsey -- an undisputedly non-biased source -- about Staub's inappropriate behavior towards radiology students.

- Unaddressed are the actual circumstances surrounding Staub's receipt of the January Corrective Action, which are incorrectly portrayed in the Petition. Proctor's Director of Human Resources, Brenda Carothers *personally* investigated the circumstances surrounding the January Corrective Action, *personally* recommended that the Corrective Action be issued, and *personally* discussed the matter with Staub. It was undisputed that Carothers harbored no animus toward Staub.

- Unaddressed is Staub's true tract record at Proctor, which has been inaccurately depicted as that of an exemplary employee. Staub may have been an angio tech at Proctor for a total of 14 years, but that period was interrupted by his termination for insubordination and repeated refusals to cooperate with Proctor's directives.

- Perhaps most fundamental, unaddressed is the actual trial evidence regarding the actions of Angie Day. In his Petition, Staub tries to paint Day as a co-worker loaded with military animus. To the contrary, there was no such evidence of bias presented at trial.

Staub would like this Court to believe that he is a patriot victimized by a workplace conspiracy -- and nothing else. Swept under the carpet are all of the complaints, the attitude problems, the refusals to cooperate and contribute while in the workplace. Likewise absent from his Petition are any discussion of his prior termination and any reference to the host of non-biased sources who reflect the collective view that Staub was simply a bad egg.

The full slate of facts appears in the record. However, the task of locating and reconciling those facts with the spotty version presented in Staub's Petition is daunting. This case is not a straight shot, light on facts and primed for appeal. To the contrary, it will require a fact-intensive analysis, an exercise that, given the other points raised by Proctor in this brief, ultimately will serve none of the purposes outlined in Supreme Court Rule 10. As a result, Staub's Petition should be denied.

III. Petitioner's Current Arguments Are Contrary To His Position Below And Represent An Attempt To Entice The Court To Take An Ill-Suited Case On The Sole Basis That It Involves The Cat's Paw Doctrine.

Until arriving on the Supreme Court's doorstep, this case has *never* been about the appropriate standard to apply. The Petition for Writ of Certiorari should be denied: (1) because Staub never argued for a different standard -- not at the district court level,

not on appeal, and not even in asking for reconsideration by the Seventh Circuit *en banc* (2) because Staub in fact endorsed and argued *in favor of* the Seventh Circuit's standard articulated in *Brewer*, and (3) because the litigation has now been contorted in an attempt to persuade this Court to accept a cat's paw case regardless of the issues in dispute.

This Court's practice is to decline to decide issues not raised or resolved in the lower courts. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001). The current argument advanced by Staub is just that -- one that he failed to raise or have resolved in the lower courts. Despite numerous opportunities, including two briefs to the Seventh Circuit as well as on oral argument, Staub failed even to suggest that a different standard may be appropriate.

Staub never asked the Seventh Circuit to apply -- or even consider applying -- a different standard. His failure to object to the application of *Brewer* -- and in fact his argument *in favor of it* -- deprived the appellate court of an opportunity to reexamine the validity of the standard.

This case has never been a contest regarding the appropriate standard of influence a non-decision maker must have to impute her animus to an employment decision. To the contrary, Staub has been a continuous advocate of the Seventh Circuit's standard throughout, arguing instead that Buck's investigation was not adequate -- until now.

Staub's briefs bear this out, demonstrating that the validity of the *Brewer* decision's standard on the level of influence has never been at issue. In his appellate brief, Staub first attempted to argue that this was not a cat's paw case at all, an argument properly rejected by the Seventh Circuit as not having been raised below. Staub then went on to stress the appropriateness of the Seventh Circuit's standard:

> This Circuit, like other circuits, has worked carefully to craft an appropriate standard for imputing subordinate bias to a decisionmaker. The *Brewer* case resolved the previous confusion with two simple expressions of the appropriate standard: The subordinate must exert "singular influence" over the decisionmaker, and an employer may avoid such a finding if the decisionmaker conducts a truly "independent investigation" into the underlying circumstances.

(Staub App. Br. 34.) Staub also made no argument whatsoever against the Seventh Circuit's standard in his Petition for Panel Hearing and Rehearing *En Banc*. Rather than argue for a new standard, as he would have done had it truly been an issue in this case, Staub again argued *in favor of Brewer* -- contending that the Seventh Circuit's reversal was contrary to

Brewer, *Hill*[5], and the portion of *BCI Coca-Cola*[6] regarding the adequacy of the independent investigation:

> The Panel decision conflicts with the Court's decision in *Brewer v. Board of Trustees* and the decisions of the Fourth and Tenth Federal Court of Appeals.
>
> * * *
>
> Contrary to its prior decision in *Brewer v. Board of Trustees*, the Panel decision has held that an employee fired for misconduct cannot, as a matter of law, establish singular influence supporting a cat's paw theory if a decision maker simply reviews the employee's personnel file without independently investigating the animus-driven charges of misconduct which caused the termination.
>
> *Brewer* requires that a decision maker independently investigate the charges of misconduct before the employer can be absolved of liability.... *Brewer* holds that

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[5] *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004).

[6] *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006).

> the employer "will not be liable...so long as it independently considers both stories." Here, there was no independent investigation.

(Emphasis in original; citations omitted.) (Staub Pet. for Panel Hr'g 1, 4-5.)

Addressing the argument that Staub actually raised, the Seventh Circuit held that Buck's investigation *was* adequate: "Viewing the evidence reasonably, it simply cannot be said that Buck did anything other than exercise her independent judgment, following a reasonable review of the facts, and simply decide that Staub was not a team player." (App. 21a.)

The current Petition represents a forced attempt to thrust an off-point cat's paw matter before this Court on issues not dispositive in this case. Rather than appealing on issues consistent with his ongoing theory of the case, Staub now tries to mold his argument into a dispute among the circuits about the appropriate standard regarding level of influence, abandoning his long-standing position that the *Brewer* standard is correct and that Buck did not conduct an adequate independent investigation.

This Court has always acted in a reasoned, practical fashion, accepting only those cases that address clear points of contention that have been fully litigated by the parties, and that maximize judicial resources. Here, Staub attempts to push a square peg

through a round hole. Unsurprisingly, the fit is not a good one. While the Court may wish to address the "standard of influence" under the cat's paw doctrine in an appropriate case, this simply is not it.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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REPLY BRIEF

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

No. 09-400

In The

SUPREME COURT OF THE UNITED STATES

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Respondent does not dispute the existence of the inter-circuit conflict described in the petition. Respondent instead advances a series of factual contentions, seeking to persuade the Court that the dismissal of Staub was not caused or even influenced by the actions of his anti-military superiors. Those very factual contentions, however, were considered and rejected by the jury that decided this case. At this stage in the litigation the remaining and controlling issue is a straightforward question of law, whether the facts found by the jury are sufficient to warrant the imposition of liability on the employer.

I. THE JURY VERDICT DETERMINED THAT THE ANTI-MILITARY ANIMUS OF STAUB'S SUPERIORS CAUSED HIS DISMISSAL

The jury verdict in this case squarely poses the question presented. The jury concluded that animus towards Staub's military status was the but-for cause of his dismissal.[1] The relevant jury interrogatories and answers were as follows:

> 1. Has Plaintiff proved by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the decision to discharge him?
>
> Yes.
>
> 2. Has the Defendant proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status?

---

[1] USERRA expressly provides that where a plaintiff proves that military status was a motivating factor, the burden of proof shifts to the employer to demonstrate that it would have made the same decision even in the absence of that military status. 38 U.S.C. § 4311(c)(1).

No.

(Court of Appeals Record, at 102; Judgment, Docket No.104).

This finding would be sufficient as a matter of law to require the imposition of liability in the four circuits that apply the causation standard. (Petition, pp. 18-22). It would also be sufficient in the six circuits that apply the less demanding "influence" standard. (Petition, pp. 23-30). An impermissible factor that was the but for cause of adverse employment action necessarily had an influence -- indeed, a decisive influence -- over that decision.

The court below, however, applied a different, far more stringent standard, which the Seventh Circuit denotes as the "cat's paw theory." (App. 12, 13, 15, 16, 17, 18).[2] Under that standard a plaintiff must do more than prove that a biased official acting with an unlawful purpose influenced, or even caused, an adverse employment action.

> Decisionmakers usually have to rely on others' opinions to some extent because they are removed from the underlying situation. But to be a cat's paw requires more; true to the fable, it requires blind reliance . . .

(App. 21a). The Seventh Circuit cat's paw standard was not satisfied, the court held, because Buck although crediting the information that had been provided by biased subordinates "exercise[d] her independent judgment" in deciding what

[2]The phrase "cat's paw" appears 21 times in the court of appeals' decision.

disciplinary action to take in light of that information. (Id.).[3] Under the Seventh Circuit standard it did not matter that Buck indisputably did rely on information from Mulally and Korenchuk, so long as she did not blindly rely on recommendations from them about how to punish Staub. (App. 20a-21a). The court of appeals held that the absence of blind reliance on a recommendation--despite the jury's finding of but-for causation--precluded imposition of liability under the Seventh Circuit's stringent cat's paw (or "singular influence") standard. (App. 20a).[4]

That jury verdict, on the other hand, would clearly have sufficed under the very different standards in ten other circuits, which require that a plaintiff demonstrate only that the biased officials influenced, or caused, the adverse employment action complained of. Biased officials can readily cause or influence the dismissal of a worker by providing inaccurate adverse information to key decisionmakers, even if the biased officials do not even make any recommendation regarding punishment. The jury in this case concluded that the biased officials had indeed caused Staub's termination. Thus a decision by this Court as to the controlling legal standard would be dispositive.

Respondent objects that a determination of the merits of Staub's claim--whether he was indeed "a patriot victimized by a

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[3]Thus the court of appeals insisted that it was error even to permit the jury to hear the compelling evidence that Mulally and Korenchuk wanted to get rid of Staub because of his military activities. (App. 18a).

[4]The court of appeals opinion contains 9 references to the "singular influence" standard.

workplace conspiracy" (Br. Opp. 16)--would "require[] an intricate study of salient details buried in the record." (Br. Opp. 14 (capitalization omitted); see id. ("will require a fact intensive analysis")).[5] But that "study of . . . the record" was the very task of the jury, which heard the same exculpatory evidence set out in the Brief in Opposition[6], and nonetheless concluded that Staub's military service, and not the other explanations offered by respondent's witnesses, was the real reason for Staub's dismissal.[7]

The petition does not require, and the Seventh Amendment would not permit, this Court to make its own factual determination as to whether Staub's military service was the but for cause of his dismissal. The jury has already resolved that factual dispute. The Question Presented is the legal issue addressed by the Seventh Circuit below: whether such a finding of fact is sufficient to impose liability on the employer.

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[5]The petition did not, as respondent contends, suggest that this case involved "minimal facts." (Br. Opp. 14). To the contrary, the petition emphasized that there were wide ranging disputes of fact at trial. (Pet. 10).

[6]Br. Opp. 3-7, 10-12, 14-16. Respondent's summary of the evidence supporting its contention that Staub was fired for legitimate reasons constitutes almost half of the Brief in Opposition.

[7]Respondent argues that its contention that Staub was fired for legitimate reasons was supported by evidence of

> complaints, . . . attitude problems, . . . refusals to cooperate and contribute while in the workplace . . . [and Staub's] prior termination. . . . The full state of facts appears in the record. However, the task of locating and reconciling those facts with the spotty version in Staub's petition is daunting.

(Br. Op. 16). The task of locating and reconciling such conflicting record evidence is precisely the responsibility of the trier of fact.

II. THE JURY VERDICT DETERMINED THAT THERE WAS NO INDEPENDENT INVESTIGATION OF THE ADVERSE INFORMATION PROVIDED BY STAUB'S ANTI-MILITARY SUPERIORS

Respondent asserts that the ultimate decisionmaker, Buck, made an "independent investigation" into the relevant circumstances and based her decision on the result of that asserted investigation. (Br. Opp. 8). But the jury in this case rejected that very factual contention. The trial court expressly instructed the jury that an employer is not liable "[i]f the decision maker . . . conducts its own investigation into the facts relevant to the decision."[8] The jury's imposition of liability on the employer therefore necessarily rested on a conclusion that Buck's decision was not based on an "investigation [by Buck] into the facts relevant to the decision."

Although respondent insists in this Court that Buck made such an independent investigation, the record contains substantial evidence supporting the finding of the jury to the contrary.[9] The

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[8]Doc. 109, p. 19.

[9]The only action by Buck which respondent itself characterizes as an "investigation" assertedly occurred in response to the grievance which Staub filed on April 27, 2004, after he had been dismissed. (Br. Opp. 7). Buck admitted, however, that with regard to that grievance she never questioned Mutally or any of the Proctor employees listed in the grievance itself. (Tr. 63, 65).

The only inquiry that Buck claimed that she did make in response to the grievance was to meet with Staub on April 29, 2004, to discuss his claims. (Tr. 82-84). Staub, however, adamantly testified that no such meeting had ever occurred. (Tr. 385). Counsel for respondent spelled out this conflict in the evidence in his closing argument.

> Mr. Staub says, "I appealed to Mrs. Buck and nothing happened." We disagree with that. Mrs. Buck . . . sent the letter to Mr. Staub saying, "following out April 29th meeting, I have decided to terminate your employment." Mr. Staub says, huh, there was no meeting, that meeting

district court expressly concluded that there was sufficient evidence to support the jury finding that no independent investigation had occurred.[10] The court of appeals, correctly viewing the record "in the light most favorable to the verdict" (App. 5a), agreed that Staub's evidence was sufficient to establish

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didn't happen. (Tr. 629).

Respondent also asserts that when Buck handed Staub his termination notice, Buck "gave him the opportunity to present his side of the story." (R.Br. 12). Respondent does not claim, however, that Buck or anyone else asked Staub for "his side of the story" regarding the events of April 20, or April 19. Rather, respondent intimates no more than that Buck was in the room when Staub received the termination notice, and thus would have heard anything Staub had chosen to say at the time. Respondent does not contend that Buck's mute presence somehow constituted an "investigation."

Respondent states that when Staub was fired "Staub . . . gave his explanation of his whereabouts. Buck listened to Staub's explanation." (Br. Opp. 7). Again, however, respondent does not contend that "listen[ing]" constitutes an "independent investigation." At the time of the termination meeting, moreover, Staub had only been told (by Korenchuk) that he was being fired for being absent from his post on April 20, 2004. In the subsequent litigation, however, Buck insisted she had actually fired Staub because he was assertedly absent from his post on a different date, April 19, 2003. At the termination meeting Staub's "explanation of his whereabouts" concerned only where he was on April 20, and did not include any account of his whereabouts on April 19, because Staub had no idea at the time that the events of April 19 were the basis of his dismissal. (Tr. 79, 359, 362, 382).

[10] App. 25a-26a:

> Whether the investigation conducted by Defendant was sufficient to meet the standards set forth in Brewer was held by this Court [in denying summary judgment] to be a question of fact, and it was one of the issues presented to the jury. In this case, the evidence about the investigation . . . is sufficient to support the jury's verdict under Brewer . . . . There was sufficient evidence for the jury to have determined that there was no truly independent investigation.

that the investigation asserted by respondent had not occurred.[11]

Respondent asserts that all courts of appeals have held that an "independent investigation" by the ultimate decisionmaker as a matter of law will always immunize an employer from liability. (Br. Opp. 8 10, 13). Because, however, the jury concluded in the instant case that there was no investigation, any such legal rule would have no effect on the outcome of this case, and would be of no relevance to the appropriateness of this case as a vehicle for deciding the question presented.

There is, moreover, no such agreement among the circuit courts; the courts of appeals are in fact divided about the legal significance of such an investigation. Several of the cases relied on by respondent actually hold that an independent investigation is not invariably a bar to liability.[12] The courts of appeals that

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[11]The court of appeals accepted Staub's evidence that "Buck . . . did not investigate Staub's contention that Mulally was out to get him because he was in the Reserves." (App. 11a).

[12]Thompson v. Coca Cola Co., 522 F. 3d 168, 179 (1st Cir. 2008) (independent investigation would not bar imposition of liability on employer if the biased official "conceal[ed] relevant information from the decisionmak[ers] . . . or [fed] false information to [them], [and was] able to influence the decision") (quoting Cariglia v. Hertz Equipment Rental Corp., 363 F. 3d 77, 87 (1st Cir. 2004)); King v. Rumsfeld, 328 F. 3d 145, 153 (4th Cir. 2003) (independent investigation would not bar imposition of liability on employer "if the record contained evidence that [the subordinate official] provided reviews of [the plaintiff's] work that falsely attributed sub-par performance to him and that [the plaintiff] was fired at least partially on that basis"); Long v. Eastfield College, 88 F. 3d 300, 307 n. 6 (5th Cir. 1996) (investigation based on review of written statements of persons other than biased officials does not constitute requisite "independent investigation" if those statements themselves were prepared "at the direction of" the biased officials); Wilson v. Stroh Companies, 952 F. 2d 942, 946 (6th Cir. 1992) (independent investigation would not bar imposition of liability if assertedly

do attach decisive importance to the existence of an "independent investigation" disagree--perhaps understandably as to what constitutes a legally conclusive "independent investigation."

Under the Seventh Circuit's cat's paw standard, an employer is never liable if the ultimate decisionmaker considered any information from an unbiased source, even if the ultimate decisionmaker gave decisive weight to tainted information from biased officials. (App. 21a). In the instant case, Buck effectively conceded that she would not have fired Staub in the absence of the adverse reports by Mulally and Korenchuk (App. 10a), and the court below acknowledged that Buck had not attempted to verify their allegations. (App. 20a). Buck testified that before dismissing Staub she had reviewed his personnel file. (App. 11a)[13]. Under the Seventh Circuit stringent "cat's paw" standard, because the personnel file contained some non-tainted information, the mere act of looking at that file was sufficient by itself to immunize the employer from liability. (App. 20a-21a).

No other court of appeals accords an employer immunity simply because some non-tainted information was considered by the ultimate decisionmaker. In the instant case the jury found that the consideration of that untainted information was not the cause of

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biased supervisor who reported misconduct by black plaintiff "had not reported such misconduct from white employees").

[13]This testimony was inconsistent with Buck's earlier testimony that "the reason why [Staub] was terminated" was set forth in the termination notice. (Tr. 48). The termination notice itself referred solely to Staub's alleged absence from his work station, and contained no reference to any of the matters later relied on by Buck and by the court of appeals. (P. Ex. 25; Tr. 47).

Staub's dismissal, expressly concluding that Proctor would not have fired Staub but for his military status. In ten circuits that finding would mandate the imposition of liability on the employer. The Tenth Circuit in essentially identical circumstances held that consideration of this sort of additional information does not protect the employer from liability.[14] Thus in this respect as well a decision by this Court regarding the applicable legal standard would determine the outcome of the instant appeal.

III. PETITIONER DID NOT URGE THE ADOPTION OF THE SEVENTH CIRCUIT'S "CAT'S PAW" STANDARD

When this case was tried, the controlling precedent in the Seventh Circuit regarding employer liability was the decision in Brewer v. Board of Trustees of University of Illinois, 479 F. 3d 908 (7th Cir. 2008). The decision in Brewer relied on sixteen earlier Seventh Circuit decisions, dating back to 1990, and joined by virtually every then serving member of that circuit court. 479 F. 3d at 917 18. It simply is not true, as respondent suggests, that Staub somehow "failed to . . . have resolved in the lower

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[14] In EEOC v. BCI Coca Cola, 450 F. 3d 476 (10th Cir. 2006), the employer had argued, and the district court had agreed, that the ultimate decisionmaker

> did not rely solely on [the allegedly biased official] but conducted an independent investigation. This investigation consisted of . . . directing [a subordinate] to pull [the victim's] personnel file. We find this "investigation" inadequate, as a matter of law, to defeat the inference that [the biased official's] racial bias tainted the decision. Obviously, the file contained no information about the recent incident [involving that official], so it is difficult to see how reading it could "independently" confirm what had happened. . . . Simply pulling the file therefore does not constitute an independent investigation . . . .

450 F. 3d at 492 93.

courts" what standard should apply where an improperly motivated company official causes or influences the actions of another official. (Br. Opp. 17). To the contrary, panels in the Seventh Circuit have been resolving precisely that issue in several dozens case over many years prior to the litigation of the instant case. The decision below did not "resolve" the Seventh Circuit standard at all; it merely applied well established Seventh Circuit precedent.

Respondent argues that in the trial court Staub should have urged the district judge to disregard the binding precedent in Brewer, and to apply instead the less stringent standard adopted by other circuits. (Br. Opp. 16). It would, however, have been entirely improper for the district judge to violate the requirements of Brewer, even if the judge disagreed with them, and it would have been pointless, if not vexatious, for either party to have asked the judge to do so. Similarly, respondent contends that Staub should have asked the panel which heard this case to disregard the standard in Brewer. (Br. Opp. 17). Again, however, the panel was bound by the Seventh Circuit's prior decision in Brewer, and would have regarded as wholly inappropriate an argument that it ignore the controlling law of the circuit. In the court of appeals, as in the district court, Staub was not an "advocate of" the Brewer standard (Br Opp. 17), did not argue "in favor of Brewer" (Br. Opp. 18)(emphasis omitted), and did not take the "position that the Brewer standard is correct". (Br. Opp. 20). Rather, Staub merely recognized -as he was required to do- that

Brewer stated the controlling law in the Seventh Circuit.[15]

Finally, respondent contends that Staub's petition for rehearing and rehearing en banc should have argued that Brewer was wrongly decided. (Br. Opp. 18-19). But mere legal error, in a panel decision or in an earlier circuit court opinion, is not a sufficient basis for granting rehearing en banc. Ordinarily a party seeking rehearing en banc must demonstrate either that the panel decision was in conflict with a prior circuit court decision, or that it conflicts with a decision of this Court. (F.R.App.Pro. 35(a)(1), 35(b)(1)(A)). In this case the rehearing petition, proceeding within the limitations set out in Rule 35, argued that the panel decision was inconsistent with the Seventh Circuit's earlier decision in Brewer.[16] This was not, as respondent asserts, an argument that the standard in Brewer was "correct" (Br. Opp. 20), but only an argument that the Brewer standard (right or wrong) was inconsistent with the decision of the panel. The petition for rehearing, moreover, did assert that "[t]he Panel decision conflicts with decisions from other Federal Appellate courts as to the necessary standard an employee must meet in order to impute discriminatory animus to the employer."[17] The petition specifically cited the Tenth Circuit decision in EEOC v. Bell Foun-

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[15]See, e.g., Petition for Rehearing, at 1 ("Brewer . . . held"), 4 ("Brewer requires", "Brewer holds").

[16]Petition for Rehearing, at 4 (the panel decision is "[c]ontrary to [the] prior decision in Brewer"), 5 (rule in the panel decision is "[c]ontrary to the decision in Brewer").

[17]Id. at 5.

Cola, 450 F. 3d 476 (10th Cir. 2006), which adopted the causation standard.[18] (Pet. 21).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-400

In the Supreme Court of the United States

VINCENT E. STAUB, PETITIONER

v.

PROCTOR HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Washington, D.C. 20507

QUESTION PRESENTED

Whether, and in what circumstances, an employer may be liable under the Uniformed Services Employment and Reemployment Rights Act of 1984, 38 U.S.C. 4301 *et seq.*, based on the anti-military animus of supervisors who did not take an adverse employment action themselves, but whose anti-military animus was a motivating factor for that action.

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In the Supreme Court of the United States

No. 09-400

VINCENT E. STAUB, PETITIONER

v.

PROCTOR HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. In the Uniformed Services Employment and Reemployment Rights Act of 1984 (USERRA), 38 U.S.C. 4301 *et seq.*, Congress sought "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service" and "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. 4301(a)(1) and (3). To that end, 38 U.S.C. 4311(a) provides that "[a] person who is a member of * * * a uniformed service shall not be denied initial employment, reemployment,

retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership." *Ibid.*

An employee who has suffered discrimination in violation of USERRA may bring an action against his or her employer for damages and equitable relief. 38 U.S.C. 4323. The employee can establish a prima facie case of discrimination by showing that a protected status or activity—such as the performance of military service, see 20 C.F.R. 1002.22—was "a motivating factor in the employer's action." 38 U.S.C. 4311(c)(1). If the employee makes such a showing, the employer may avoid liability by establishing that "the action would have been taken in the absence of" the employee's military status. *Ibid.*

2. Petitioner, a member of the United States Army Reserve, was employed by respondent as an angiography technologist. Pet. App. 2a-3a. Janice Mulally, who was second in command of the department where petitioner worked, was openly hostile to his reserve duties. *Id.* at 3a-4a. For example, she "scheduled him for additional shifts without notice," saying that the extra shifts were a way for him to "pay[] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves." *Id.* at 4a (brackets in original). The head of petitioner's department, Michael Korenchuk, was also critical of petitioner's military weekend duty obligations, which he called "a b[u]nch of smoking and joking and [a] waste of taxpayers[']] money." *Ibid.* (brackets in original). After petitioner returned from active duty in early 2003, Korenchuk knew "that Mulally was 'out to get' [petitioner]," but he did nothing to stop her. *Id.* at 4a-5a.

In January 2004, petitioner was ordered "to report for 'soldier readiness processing'" in anticipation of another call to active duty. Pet. App. 6a. Korenchuk was concerned about the expense of having to hire a temporary replacement for petitioner. *Ibid.* A few weeks later, Mulally gave a written warning to petitioner for not being at his work area. *Ibid.* According to Mulally, employees in petitioner's unit were supposed to report to the diagnostic imaging services unit whenever they were not working with a patient in the angiography unit. *Id.* at 6a-7a. Petitioner disputed that such a policy existed or that he had violated it, but Korenchuk signed Mulally's warning to petitioner in order "to get her off of his back." *Id.* at 7a. Under the terms of the warning, petitioner was required to report to Korenchuk or Mulally whenever he did not have any patients and whenever he needed to leave his work station. *Ibid.*; see Def. Exh. 3 (Jan. 27, 2004) (Corrective Action: Written).

In April 2004, Angie Day, a former co-worker of petitioner's, met with Korenchuk, Vice President of Human Resources Linda Buck, and Chief Operating Officer R. Garrett McGowan to complain that Korenchuk had failed to address her concerns that petitioner was "abrupt" in dealings with her and that petitioner would "absent himself from the department." Pet. App. 8a, 51a. McGowan ordered Buck to create a plan to solve petitioner's availability problems. *Id.* at 8a-9a. Before Buck did that, however, Korenchuk reported to Buck on April 20, 2004, that he was unable to locate petitioner and that petitioner had failed to report in as instructed. *Id.* at 9a-10a; see *id.* at 9a n.3. Based on that report and a review of petitioner's personnel file, Buck decided that petitioner should be discharged. *Id.* at 10a-11a; 1/7/08 Tr. 62, 105-106.

At the time Korenchuk was unable to find petitioner, petitioner was in the cafeteria having lunch with one of his coworkers, Leslie Sweborg. Pet. App. 9a. When petitioner returned from lunch, he told Korenchuk that he and Sweborg had looked for him earlier and had left him a voice mail regarding leaving for lunch. *Ibid.* Korenchuk then escorted petitioner to Buck's office, where he was given his termination notice. *Id.* at 10a. The notice stated that petitioner was being discharged for failing to follow the terms of the January warning, which required him to inform Korenchuk or Mulally before leaving the general diagnostic area. Def. Exh. 5 (Corrective Action: Termination); Pet. App. 10a. The notice stated: "To date, [petitioner] has ignored that directive." Def. Exh. 5. Similarly, Buck's documentation of her meeting with Korenchuk stated that her termination decision was "[b]ased on the disciplinary action done in January and the continuing problems." Pl. Exh. 47 (Buck's Narrative Regarding Termination Decision). When petitioner arrived in Buck's office, Buck did not ask him about the January warning or whether he had reported in as directed. 1/8/08 Tr. 362. Buck simply asked him to sign the termination notice, and a security guard immediately escorted petitioner out of Buck's office. Pet. App. 10a; 1/8/08 Tr. 362.

Petitioner thereafter unsuccessfully challenged his termination through respondent's grievance process. Pet. App. 11a. Although petitioner argued in his grievance that Mulally had fabricated the basis for the January warning, "Buck did not follow up with Mulally about this claim * * * and she did not investigate [petitioner's] contention that Mulally was out to get him because he was in the Reserves." *Ibid.* Buck's investigation consisted solely of discussing the January warning with

another Human Resources employee who received information from Mulally and was present when the warning was given, but not when the alleged misconduct occurred. 1/7/08 Tr. 65; Pet. App. 8a.

3. Petitioner brought this action against respondent in the United States District Court for the Central District of Illinois, alleging that his termination violated USERRA. With the parties' consent, the district court referred the case for a jury trial before a magistrate judge. Pet. App. 23a. As required by *Brewer* v. *Board of Trustees of the University of Illinois*, 479 F.3d 908, 917 (7th Cir.), cert. denied, 552 U.S. 825 (2007), the court instructed the jury that "[a]nimosity of a co-worker toward the [petitioner] on the basis of [petitioner's] military status as a motivating factor may not be attributed to [respondent] unless that co-worker exercised such singular influence over the decision-maker that the co-worker was basically the real decision maker." Pet. App. 16a. The court also instructed that "[i]f the decision maker is not wholly dependent on a single source of information but instead conducts its own investigation into the facts * * *, [respondent] is not liable for a non-decision maker's submission of misinformation or selectively chosen information or failure to provide relevant information to the decision maker." *Ibid.*

The jury returned a special verdict in which it found that petitioner "proved by a preponderance of the evidence that [his] military status was a motivating factor in [respondent's] decision to discharge him" and that respondent failed to prove that petitioner "would have been discharged regardless of his military status." 1:04-cv-01219 Docket entry No. 102 (C.D. Ill. Jan. 10, 2008) (special verdict form). The jury awarded $57,640 in damages. Pet. App. 23a. The magistrate judge subse-

quently denied respondent's motion for judgment as a matter of law or for a new trial. *Id.* at 23a-31a.

4. The court of appeals reversed. Pet. App. 1a-21a. The court began by stating that the case involved what it described as the "'cat's paw' theory" of liability, a term derived from a La Fontaine fable in which a monkey persuades an unwitting cat to pull chestnuts out of a hot fire. *Id.* at 1a. Under that theory, "the discriminatory animus of a nondecisionmaker is imputed to the decisionmaker where the former has singular influence over the latter and uses that influence to cause the adverse employment action"—in other words, where the decisionmaker is the dupe, or cat's paw, of the employee with a discriminatory motive. *Id.* at 2a. The court emphasized that liability under the cat's paw theory requires "a blind reliance, the stuff of 'singular influence.'" *Id.* at 21a.

The court of appeals held that the jury instructions were "not technically wrong" because they told the jury that it could "only consider nondecisionmaker animosity in the case of singular influence, and even then that the employer is off the hook if the decisionmaker did her own investigation." Pet. App. 17a. But the court added that if there is insufficient evidence to support a finding of "singular influence," then the district court "has no business admitting evidence of animus by nondecisionmakers." *Ibid.* In this case, the court of appeals concluded, the magistrate judge had erred in admitting evidence of Mulally's animus—"the strongest proof of anti-military sentiment"—without first "making a threshold determination of whether a reasonable jury could find singular influence." *Id.* at 18a-19a.

The court of appeals went on to hold that, based on the evidence presented at trial, respondent was entitled

to judgment as a matter of law. Pet. App. 19a. The court stated that Buck, who made the decision to fire petitioner, was "free of any military-based animus," and "a reasonable jury could not find that Mulally (or anyone else) had singular influence over Buck." *Id.* at 20a. Instead, the court found, "Buck looked beyond what Mulally and Korenchuk had said" about petitioner. *Ibid.* Although her "investigation could have been more robust," the court continued, the decisionmaker need not "be a paragon of independence" so long as she "'is not wholly dependent on a single source of information' and conducts her 'own investigation into the facts relevant to the decision.'" *Id.* at 20a-21a (quoting *Brewer*, 479 F.3d at 918). The court therefore concluded that "a reasonable jury could [not] have concluded that [petitioner] was fired because he was a member of the military." *Id.* at 21a.

DISCUSSION

By requiring a subordinate employee's discriminatory animus to exert "singular influence" over the ultimate decisionmaker in order to warrant liability, the court of appeals disregarded the text of USERRA. The statute specifically provides for liability where a person's military status is "a *motivating factor* in the employer's action." 38 U.S.C. 4311(c) (emphasis added); see 42 U.S.C. 2000e-2(m) (similar Title VII "motivating factor" provision). The decision of the court of appeals also conflicts with the decisions of all but one of the eleven other courts of appeals to have addressed this issue. The question presented in this case is important and recurring, and this Court's review is therefore warranted.

A. The Question Presented Is Important And Warrants This Court's Review

1. The decision below warrants this Court's review because it undermines the enforcement of USERRA, frustrating the congressional objective of "encourag[ing] noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(2). As the Tenth Circuit aptly observed in *EEOC* v. *BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (2006), cert. dismissed, 549 U.S. 1334 (2007), a "functional decisionmaker" standard like that adopted by the court below would "undermine[] the deterrent effect of subordinate bias claims, allowing employers to escape liability * * * on the theory that the subordinate did not exercise complete control over the decisionmaker." *Id.* at 487.

The decision will also affect the enforcement of other federal anti-discrimination statutes, including Title VII. In addition to its basic non-discrimination provision (42 U.S.C. 2000e-2(a)), Title VII of the Civil Rights Act of 1964, like USERRA, contains language making it an unlawful employment practice for an employer to take an adverse action when an improper consideration is a "motivating factor" for that action. 42 U.S.C. 2000e-2(m); see *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003). Certain other anti-discrimination statutes permit relief based not upon a showing that the prohibited consideration was a "motivating factor" for the adverse employment practice, but only upon a showing of "but-for" causation. See *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349-2350 (2009) (to prove a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, "but-for" causation must be shown).

But in either case, the court of appeals' stringent "singular influence" standard is incorrect for the reasons explained below.

2. The decision below is in accord with *Hill* v. *Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), petition for cert. dismissed, 543 U.S. 1132 (2005). But as petitioner notes (Pet. 15-32), it is inconsistent with the decisions of ten other courts of appeals, which have imputed liability to an employer when a biased subordinate influenced, but did not herself take, the adverse employment action. See *Santiago-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Rose* v. *New York City Bd. of Educ.*, 257 F.3d 156, 161-162 (2d Cir. 2001); *Abramson* v. *William Patterson Coll.*, 260 F.3d 265, 286 (3d Cir. 2001); *Russell* v. *McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000); *Madden* v. *Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 677 (6th Cir. 2008); *Stacks* v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1322-1323 (8th Cir. 1994); *Poland* v. *Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007); *BCI Coca-Cola*, 450 F.3d at 487; *Stimpson* v. *City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), cert. denied, 529 U.S. 1053 (2000); *Griffin* v. *Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998).

Justice Alito observed last Term that the courts of appeals "disagree about the proper standard" governing "the circumstances in which an employer may be held liable based on the discriminatory intent of subordinate officials who influence but do not make the ultimate employment decision." *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2688 (2009) (Alito, J., concurring). The Court attempted to resolve the issue by granting review in *BCI Coca-Cola* and by inviting the Solicitor General to file a brief ex-

pressing the views of the United States concerning whether certiorari should be granted in *Hill*. In both cases, however, the petitioners withdrew their petitions before the Court was able to address the merits. See *BCI Coca-Cola Bottling Co.* v. *EEOC*, 549 U.S. 1334 (2007) (No. 06-341); *Hill* v. *Lockheed Martin Logistics Mgmt., Inc.*, 543 U.S. 1132 (2005) (No. 03-1443). The circuit conflict has persisted and continues to warrant resolution.

B. The Court Of Appeals Erred In Requiring Petitioner To Show That The Employee With Discriminatory Animus Had "Singular Influence" Over The Adverse Employment Action

1. USERRA makes it unlawful for an employer to discharge an employee if that employee's membership, service, or obligation for service in the uniformed services "is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, * * * service, * * * or obligation for service." 38 U.S.C. 4311(c)(1). The statute defines "employer" to include any "person * * * that has control over employment opportunities" and any "person * * * to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i).

The statutory definition of "employer" reflects long-established agency law, under which "principals or employers" are "vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). That principle applies to "both negligent and intentional torts committed by an employee within the scope of his or her

employment." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 756 (1998). And it applies regardless whether the employer authorized or knew about the acts of the agent. *Railroad Co.* v. *Hanning*, 82 U.S. (15 Wall.) 649, 657 (1873). Employees act within the scope of their employment whenever they are "exercising the authority delegated to [them.]" *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909).

Consistent with those established principles, when an employer delegates authority to a supervisor to engage in customary employment responsibilities—such as assigning work, monitoring an employee's performance, deciding whether to report a matter for discipline, gathering the facts relating to that matter, or making a recommendation on what action should be taken—a supervisor's exercise of that authority falls within the scope of the supervisor's employment. Accordingly, when delegated authority of this kind is exercised in a discriminatory manner and causes an adverse employment action in violation of USERRA, the employer is liable under agency principles and Section 4303(4)(A)(i).*

2. In this case, the jury made a specific finding that petitioner's military status was a motivating factor in his termination. That finding established a prima facie case of liability under Section 4311(c)(1), and the evidence at

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* By contrast, an employer would not be vicariously liable if a customer or an independent contractor, acting with a discriminatory motive but not exercising authority delegated from the employer, falsely reported that an employee engaged in misconduct and that report caused the employee to be discharged, as long as the employer had no reason to suspect that the report was fabricated because of discriminatory animus. For similar reasons, neither would an employer be vicariously liable if an ordinary (non-supervisory) employee acting with a discriminatory motive falsely reported another employee's misconduct, and that report caused the employee's discharge.

trial fully supports it. To be sure, the evidence was conflicting. But viewing the evidence in the light most favorable to petitioner, the jury could have found that Mulally's efforts to have petitioner discharged were motivated in large measure by his military obligations. Indeed, the court of appeals noted that there was "abundant evidence of Mulally's animosity." Pet. App. 18a; see *id.* at 19a (discussing "the strongest proof of anti-military sentiment"). And both the termination notice given to petitioner and Buck's trial testimony show that Mulally's January 2004 disciplinary action against petitioner was a significant factor in causing his dismissal. *Id.* at 10a; Def. Exh. 5. There was similar evidence of Korenchuk's anti-military animus, and he too played a role in petitioner's dismissal. Pet. App. 4a, 9a-10a.

Under USERRA, respondent may be held liable for Mulally's, Korenchuk's, and Buck's actions in relation to petitioner's termination. A termination decision is a paradigmatic adverse action triggering vicarious employer liability under the employment discrimination laws, including USERRA. See *Burlington*, 524 U.S. at 760-763; *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 790 (1998); *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 70-71 (1986). Moreover, Mulally, Korenchuk, and Buck were all acting within the scope of their delegated authority when they took the actions contributing to petitioner's dismissal. See *Burlington*, 524 U.S. at 756; *Faragher*, 524 U.S. at 793. The three of them were petitioner's superiors and had authority to direct his day-to-day work activities. Mulally acted within her authority when she gave petitioner a formal warning for "Failure to Follow Instructions" and "Lack of Cooperation." Def. Exh. 3; Pet. App. 6a. Korenchuk acted within his authority when he gave Buck the false report that peti-

tioner had not complied with the January 2004 directive. 1/7/08 Tr. 47-48; Pet. App. 9a-10a. And Buck acted within her authority when she terminated petitioner without attempting to hear his side of the story. *Id.* at 10a-11a.

3. The court of appeals set aside the jury's verdict because it erroneously believed that the discriminatory animus of an individual who is not the ultimate decisionmaker can trigger liability only when the individual "has singular influence over" the decisionmaker "and uses that influence to cause the adverse employment action." Pet. App. 2a, 21a. It is not enough, the court held, that a supervising employee's animus plays a substantial role in a high-level manager's decision to fire another employee; rather, "true to the fable" of the monkey and the cat, actionable discrimination exists only when the decisionmaker exhibits "a blind reliance" on the biased supervisor's opinions. *Id.* at 21a ("Decisionmakers usually have to rely on others' opinions to some extent because they are removed from the underlying situation. But to be a cat's paw requires more; true to the fable, it requires a blind reliance, the stuff of 'singular influence.'"); see *Brewer* v. *Board of Trs. of the Univ. of Ill.*, 479 F.3d 908, 917-918 (7th Cir.) (holding that, to show "singular influence," "the employee must possess so much influence as to basically be herself the true 'functional[] . . . decision-maker'" and "[t]he nominal decision-maker must be nothing more than the functional decision-maker's 'cat's paw'") (citations omitted), cert. denied, 552 U.S. 825 (2007).

The terms "singular influence" and "blind reliance" do not appear in USERRA, and a "singular influence" standard is inconsistent with that prescribed in the statute's plain text. That text requires the plaintiff to show

nothing more than that his or her military status was a "motivating factor in the employer's action." 38 U.S.C. 4311(c)(1). As this Court has made clear, protected status or conduct is a "motivating factor" in an action when it plays a "substantial" role in bringing that action about. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977); see also *Gagnon* v. *Sprint Corp.*, 284 F.3d 839, 853-854 (8th Cir.), cert. denied, 537 U.S. 1001, and 537 U.S. 1014 (2002). Indeed, protected status can be a "motivating factor" in an adverse employment decision even if it is not a but-for cause of that decision. See *Gross*, 129 S. Ct. at 2350 & n.3. *A fortiori*, protected status can be a "motivating factor" in an adverse employment decision even if it does not exert "singular influence" over that decision. Where, as here, the discriminatory animus of a supervisory employee who is not the ultimate decisionmaker sets in motion and plays a substantial role in driving an adverse employment decision, that animus is a "motivating factor" even if the ultimate decisionmaker does not act in "blind reliance" on the supervisor's recommendation. The court of appeals therefore erred in holding that "singular influence" and "blind reliance" are required.

4. The court of appeals also held, as an alternative basis for its judgment, that petitioner would have been fired even "[a]part from the friction caused by his military service." Pet. App. 20a. That holding is directly at odds with the jury's special verdict that respondent had failed to prove that it would have discharged petitioner regardless of his military status. The court of appeals' holding in this regard was based on its erroneous view that Buck had conducted an "investigation," and, "exercis[ing] her independent judgment, * * * simply de-

cide[d] that [petitioner] was not a team player." *Id.* at 21a.

To be sure, an independent investigation is capable of breaking the causal chain between a supervisor's misconduct and an adverse employment action. The chain of causation will be broken by a subsequent investigation when, as a result of the investigation, the supervisor's discriminatory misuse of authority can no longer be regarded as a "motivating factor" in the adverse action. See, *e.g.*, *Poland*, 494 F.3d at 1183; *BCI Coca-Cola*, 450 F.3d at 488; *Collins* v. *New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002); *Stimpson*, 186 F.3d at 1332; *Long* v. *Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996). In addition, an independent investigation may establish that an employee would have been fired anyway, without regard to his protected status, thus creating a defense to liability under Section 4311(c)(1).

In this case, however, Buck did nothing more than consult with Korenchuk, review petitioner's personnel file, and rely on her recollection of what the court of appeals described as other "past issues" concerning petitioner, none of which had been the subject of discipline. Pet. App. 10a-11a; 1/7/08 Tr. 86-87. She did not question petitioner himself or interview any witnesses, including Sweborg, prior to terminating petitioner. Pet. App. 10a-11a. Her mere review of a personnel file was insufficient to break the causal link between Mulally's discriminatory motives and petitioner's termination. As the Tenth Circuit reasoned in *BCI Coca-Cola* in response to similar circumstances, review of a pre-existing personnel file cannot "independently" confirm the basis for termination because "[o]bviously the file contain[s] no information about the recent incident" underlying the termination. 450 F.3d at 492-493. Here, petitioner's personnel

file contained nothing about the April 20, 2004, incident that precipitated his termination. The minimal efforts by Buck—which even the court of appeals conceded "could have been more robust" (Pet. App. 20a)— were therefore insufficient to undermine the jury's determination that respondent had failed to prove that it would have discharged petitioner regardless of his military service.

Like its erroneous conclusion that evidence of Mulally's anti-military animus was improperly admitted (Pet. App. 18a), the court of appeals' assessment of Buck's investigation was based upon its erroneous interpretation of the cat's paw theory of liability. Relying again on *Brewer*, the court of appeals found Buck's inquiry sufficient to absolve respondent of liability under USERRA because Buck was "not wholly dependent on a single source of information" but instead "conduct[ed] her 'own investigation into the facts relevant to the decision.'" *Id.* at 21a (quoting *Brewer*, 479 F.3d at 918). And it found Buck's investigation adequate to preclude employer liability under its cat's paw theory, even though it recognized that Buck "failed to pursue [petitioner's] theory that Mulally fabricated the [January 2004] write-up; [and that] had Buck done so, she may have discovered that Mulally indeed bore a great deal of anti-military animus." *Id.* at 20a. Thus, the court of appeals' reversal of the judgment in petitioner's favor rested upon its erroneous view that employer liability for the discriminatory acts of supervisors who do not take the final adverse employment action may be predicated only upon the cat's paw theory of liability.

C. This Case Is An Appropriate Vehicle For Resolving The Question Presented

This case is an appropriate vehicle for resolution of the question presented. In light of the jury's specific findings that Mulally's anti-military animus was a motivating factor in petitioner's termination, and that respondent failed to prove that petitioner would have been discharged regardless of his military service, the question of employer liability in these circumstances is squarely presented.

Respondent's arguments to the contrary are unpersuasive. First, respondent asserts (Br. in Opp. 8-13) that this case is not a good candidate for review because resolution of the question presented would not alter the outcome given Buck's "independent investigation." But the record contains substantial support for the jury's specific finding that Buck's investigation was insufficient to establish that petitioner would have been discharged regardless of his military service. See pp. 15-16, *supra*. Moreover, as explained above, the court of appeals' holding regarding the adequacy of Buck's investigation was itself infected by the court's incorrect application of the cat's paw theory of liability.

Second, respondent contends (Br. in Opp. 14-16) that this case "requires an intricate study of salient details buried in the record but unaddressed by the petition." Again, this Court need not weigh the evidence because the jury heard all of the evidence and decided the case in petitioner's favor. The only issue the Court need decide is the purely legal question addressed by the court of appeals.

Third, respondent contends (Br. in Opp. 16-21) that certiorari is inappropriate because petitioner never argued below that the Seventh Circuit's *Brewer* standard

is incorrect. Given the developed body of law in the Seventh Circuit on the cat's paw doctrine, however, it would have been futile for petitioner to argue before the district court and court of appeals for any different standard. See Reply Br. 9-12; cf. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007). Thus, petitioner's failure to argue for a different standard below does not preclude a grant of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2010

JOINT APPENDIX

Supreme Court, U.S.
FILED
JUL 2 2010
OFFICE OF THE CLERK

No. 09-400

IN THE

Supreme Court of the United States

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 22, 2009
CERTIORARI GRANTED APRIL 19, 2010

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APPENDIX A — DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS (PEORIA)

U.S. District Court
CENTRAL DISTRICT OF ILLINOIS (Peoria)
CIVIL DOCKET FOR CASE #: 1:04 cv 01219 JAG

Staub v. Proctor Hospital, et al
Assigned to: Magistrate Judge John A. Gorman
Demand: $1,000,000
Case in other court: CA7, 08Ñ02255
CA7, 08Ñ02402

Date Filed: 06/30/2004
Date Terminated: 01/11/2008
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Cause: 38:4301 Uniformed Svcs Emplmnt and Re-Emplmnt Act of 1994

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Appendix A

Date Filed	#	Page	Docket Text
6/30/2004	*1*	24	COMPLAINT &demand for Jury Trial, filed. Case referred to Mag. Judge Byron G. Cudmore (HK, iled) Modified on 6/30/2004 (HK, iled). (Entered: 6/30/2004)
8/26/2004	*10*	47	MOTION to Dismiss Counts II and III, MOTION to Strike jury demand *1* Complaint by Defendants Janis Mulally, Proctor Hospital. Responses due by 9/9/2004 (CL, iled) (HK, iled). (Entered: 08/27/2004)
11/17/2004	*14*	78	REPORT AND RECOMMENDATION by Magistrate Judge Byron Cudmore: The Court RECOMMENDS that *10* Defendants' MOTION to Dismiss and MOTION to Strike be DENIED. Objections to RRdue by 12/2/2004. See written order signed by Judge Byron G. Cudmore on 11/17/04. (LB, iled) (Entered: 11/17/2004)
01/20/2005	*19*	114	ORDER adopting Report and Recommendation *14*; denying *10* Motion to Dismiss, denying *10* Motion to Strike. Further ORDERED that Counts II and III

	are dismissed without prejudice. Entered by Judge Joe Billy McDade on 1/20/05. (CL, iled) (Entered: 01/21/2005)
01/21/2005	TEXT ORDER by Magistrate Judge Byron Cudmore. Based upon Judge McDade's Order *19* adopting the Report and Recommendation *14* in full, Plaintiff to file his Amended Complaint, if any, to add a claim for liquidated damages by 2/4/2005. Defendant directed to answer by 2/16/2005. Telephonic Rule 16 Scheduling Conference set Wednesday, 2/23/2005, at 11:00 AM before Magistrate Judge Byron G. Cudmore. Court to initiate conference call. Attorneys are directed to comply with Federal Rule of Civil Procedure 26(f) by meeting as soon as practicable, and in any event at least fourteen (14) days prior to the scheduling conference, and are to submit a proposed discovery plan in writing to the Court on or before 2/18/2005. Such a plan must include, at a minimum, those items listed in CDIL-LR 26.2(3), Rule 26(f), and CDIL-LR 16.2(E) with proposed

			deadlines. If a discovery plan is not submitted as required, the discovery conference will not be held and costs may be assessed. Entered by Judge Cudmore on 1/21/05. (LB, ilcd) (Entered: 01/21/2005)
02/02/2005	*20*	118	AMENDED COMPLAINT against Proctor Hospital, filed by Vincent E Staub.(Gifford, Michael) (Entered: 02/02/2005)
02/15/2005	*22*	127	ANSWER to Amended Complaint by Defendant Proctor Hospital. (Davis, Roy) (Entered: 02/15/2005)
02/23/2005			TEXT ORDER by Magistrate Judge Byron Cudmore. Based upon the Report and Recommendation *14* and the Court's Order *19* adopting the Report and Recommendation, the Clerk is directed to show Defendant Janis Mulally as a terminated party herein. Entered by Judge Cudmore on 2/23/05. (LB, ilcd) (Entered: 02/23/2005)
05/11/2006	*34*	158	MOTION for Summary Judgment by Defendant Proctor Hospital. Responses due by 6/1/2006 (Attachments: *#1* Exhibit Exhibit

Appendix A

1 - Staub Deposition *#2* Exhibits to Staub Deposition *#3* Exhibit Exhibit 2 - Korenchuk Deposition *#4* Korenchuk Deposition Exhibits) (Davis, Roy) (Entered: 05/11/2006)

06/01/2006 *39* 518 MOTION to Strike *Sections of Affidavit of Linda K. Buck* by Plaintiff Vincent E Staub. Responses due by 6/15/2006 (Attachments: *#1* Errata A-Sweborg Dep Excerpts)(Galassi, Julie) (Entered: 06/01/2006)

06/01/2006 *40* 523 RESPONSE to Motion re *34* MOTION for Summary Judgment filed by Plaintiff Vincent E Staub. (Attachments: *#1* Exhibit 1 - Staub Affidavit *#2* Exhibit 2-5 *#3* Exhibit Korenchuk Deposition *#4* Exhibit Trone Deposition *#5* Exhibit Staub Deposition *#6* Exhibit Day Deposition *#7* Exhibit Sweborg Deposition *#8* Exhibit Buck Deposition *#9* Exhibit Abbadini Deposition *#10* Exhibit Mulally Deposition)(Galassi, Julie) (Entered: 06/01/2006)

06/15/2006 *41* 680 RESPONSE to Motion re *39* MOTION to Strike *Sections of Affidavit of Linda K. Buck* filed

by Defendant Proctor Hospital. (Davis, Roy) (Entered: 06/15/2006)

06/15/2006 *42* 683 REPLY to Response to Motion re *34* MOTION for Summary Judgment filed by Defendant Proctor Hospital. (Attachments: *#1* Exhibit Buck Deposition *#2* Exhibit Sweborg Deposition) (Davis, Roy) (Entered: 06/15/2006)

06/20/2006 *45* 757 MOTION to Strike *43* Affidavit *Exhibit One* by Plaintiff Vincent E Staub. Responses due by 7/4/2006 (Attachments: *#1* Exhibit One *#2* Exhibit Two)(Galassi, Julie) (Entered: 06/20/2006)

06/22/2006 *46* 770 RESPONSE to Motion re *45* MOTION to Strike *43* Affidavit *Exhibit One* filed by Defendant Proctor Hospital. (Davis, Roy) (Entered: 06/22/2006)

08/01/2006 *47* 774 ORDER denying *34* Motion for Summary Judgment, denying as moot *39* Motion to Strike, denying as moot *45* Motion to Strike Final Pretrial Conference set for 9/14/2006 10:30 AM before Judge Joe Billy McDade. Parties to meet with Judge McDade's law clerk at 9:30

	a.m. on that day to discuss jury instructions. Parties directed to submit joint proposed final pretrial order on or before 9/8/29006. Jury trial date will be set during the final pretrial conference. Entered by Judge Joe Billy McDade on 8/1/2006. (CL, iled) (Entered: 08/01/2006)
08/02/2006	TEXT ORDER granting *48* Motion to Continue. Final Pretrial Conference reset for 9/20/2006 at 11:00 AM in Courtroom D before Judge Joe Billy McDade. Parties to meet with Judge McDade's law clerk at 10:00 on that day to discuss jury instructions. Entered by Judge Joe Billy McDade on 8/2/06. (JBM3, iled) (Entered: 08/02/2006)
09/06/2006	TEXT ORDER granting *49* Motion to Continue Filing Date. Proposed Final Pretrial Order and Proposed Jury Instructions due on or before Spetember 14, 2006. Entered by Judge Joe Billy McDade on 9/6/06. (JBM3, iled) (Entered: 09/06/2006)

Appendix A

09/12/2006	TEXT ORDER Final Pretrial Conference is reset for 11/9/2006 at 10:30 AM in Courtroom D before Judge Joe Billy McDade. Parties to meet with law clerk at 9:30am on that day to discuss jury instructions. Entered by Judge Joe Billy McDade on 9/12/06. (JBM3, iled) (Entered: 09/12/2006)
11/09/2006	Minute Entry for proceeding held before Judge Joe Billy McDade: Parties present in person by Attorney Julie Galassi/Attorney Roy G Davis for Final Pretrial Conference held on 11/9/2006. Defendant files amended witness list. By agreement of parties aMiscellaneous Deadline of 1/5/2007 is set by which all motions in limine are to be filed and proposed voir dire questions are to be submitted to the court. Court resets Jury Trial to Monday, 2/12/2007, at 9:00 AM in Courtroom D before Judge Joe Billy McDade. Court sets Status Conference on Friday, 1/19/2007, at 3:00 PM in Courtroom D before Judge Joe Billy McDade to go over finalized Jury Instructions and motions in limine. (Court Reporter NM.) (ML, iled) (Entered 11/13/2006)

01/05/2007	*52*	869	First MOTION in Limine "to Bar From the Jury's Consideration Evidence of Alleged Animus Toward the Plaintiff on the part of Janice Mulally" by Defendant Proctor Hospital.Responses due by 1/19/2007 (Russo, Richard) Modified on 1/8/2007 (HK, iled). (Entered: 01/05/2007)
01/05/2007	*54*	1002	Second MOTION in Limine "To Bar from the jury's consideration testimony from Leslie Sweborg regarding any alleged animus on the part of Janice Mulally or Angela Day toward the Plaintiff" by Defendant Proctor Hospital. Responses due 1/19/2007 (Russo, Richard) Modified on 1/8/2007. (HK, iled) (Entered: 01/05/2007)
01/05/2007	*56*		Third MOTION in Limine "To bar from the jury's consideration testimony from Amy Trone regarding any alleged animus on the part of Janice Mulally toward the Plaintiff" by Defendant Proctor Hospital.Responses due by 1/19/2007 (Russo, Richard) Modified on 1/8/2007 (HK, iled). (Entered: 01/05/2007)

01/05/2007 *60*	MOTION in Limine by Plaintiff Vincent E Staub.Responses due by 1/19/2007 (Attachments: *#1* Exhibit Memo of Linda Buck*#2* Exhibit Exhibit List for Defendant*#3* Exhibit Defendant's Exhibit 1*#4* Exhibit Defendant's Exhibit 2*#5* Exhibit Defendant's Exhibit 8*#6* Exhibit Defendant's Exhibit 9*#7* Exhibit Defendant's Exhibit 10*#8* Exhibit Defendant's Exhibit 11*#9* Exhibit Defendant's Exhibit 13*#10* Exhibit Defendant's Exhibit 14*#11* Exhibit Defendant's Exhibit 15*#12* Exhibit Defendant's Exhibit 16*#13* Exhibit Defendant's Exhibit 17*#14* Exhibit Defendant's Exhibit 18*#15* Exhibit Defendant's Exhibit 19*#16* Exhibit Defendant's Exhibit 20*#17* Exhibit Excerpts from Linda Buck Dep *#18* Exhibit Excerpts from Korenchuk Dep) (Galassi, Julie) (Entered: 01/05/2007)
01/12/2007 *61*	RESPONSE to Motion re *60* MOTION in Limine filed by Defendant Proctor Hospital. (Russo, Richard) (Entered: 01/12/2007)

01/18/2007 *63*	RESPONSE to Motion re *52* First MOTION in Limine filed by Plaintiff Vincent E Staub. (Attachments: *#1* Exhibit Exhibits) (Galassi, Julie) (Entered: 01/18/2007)
01/18/2007 *64*	RESPONSE to Motion re *54* Second MOTION in Limine filed by Plaintiff Vincent E Staub. (Attachments: *#1* Exhibits Exhibits) (Galassi, Julie) (Entered: 01/18/2007)
01/18/2007 *65*	RESPONSE to Motion re *56* Third MOTION in Limine filed by Plaintiff Vincent E Staub. (Attachments: *#1* Exhibit Exhibits) (Galassi, Julie) (Entered: 01/18/2007)
01/19/2007	Minute Entry for proceedings held before Judge Joe Billy McDade: Parties present in o/c by J. Galassi for the Plf and Attys R. Davis and R. Russo for Dft for pending motions/Final Pretrial Conference held on 1/19/07. Court hears arguments on pending motions. Courts ruling: Dft's First *52* Motion in Limine and Second *54* Motion in Limine are DENIED. Dft's Third *56* Motion in Limine is

GRANTED. Plf's *59* Motion to Supplement is GRANTED. Plf's *60* Motion in Limine is GRANTED IN PART AND DENIED IN PART. References to Plf's performance evaluation are admissible as well as references to Plf's previous dismissal. References to Plf's file prior to his termination are not admissible. Dft's *62* Motion to Amend/Correct is GRANTED. Jury trial remains set for 2/12/07. (Court Reporter NM.) (RK, iled) (Entered: 01/29/2007)

01/23/2007 *66* ORDER: CONSENT to Jurisdiction by US Magistrate Judge. Case reassigned to Magistrate Judge John A. Gorman. Entered by Judge Joe Billy McDade on 1/23/07. (HK, iled) (Entered: 01/23/2007)

01/24/2007 Minute Entry for proceedings held before Judge John A. Gorman : Parties present via phone by Attys Galassi/Davis for Status Conference on Wednesday, 1/24/2007. Previous Jury Trial Date before Judge Joe Billy McDade VACATED. Pretrial Motions and

		Supplemental Final Pretrial Order including jury instructions due by 2/16/2007. Supplemental Final Pretrial Conference/Status Conference set for Wednesday, 2/28/2007 at 2:00 PM in person in chambers before Magistrate Judge John A. Gorman. Jury Trial set for Monday, 4/23/2007 at 9:00 AM in Courtroom C before Magistrate Judge John A. Gorman., (SM, iled) (Entered: 01/25/2007)
02/14/2007	*72*	Joint MOTION for Reconsideration by Defendant Proctor Hospital. Responses due by 3/5/2007 (Davis, Roy) (Entered: 02/14/2007)
02/28/2007		Minute Entry for proceedings held before Judge John A. Gorman : Parties present in chambers by Attys Galassi/Davis for Supplemental Pretrial Conference on 2/28/2007 - same held. Discussion held re legal issues and jury instructions. Pretrial Conference continued to 3/27/2007 at 1:30 PM before Magistrate Judge John A. Gorman. Jury Trial remains set for 4/23/07 in courtroom C before Magistrate Judge John A. Gorman. (SM, iled) (Entered: 02/28/2007)

Appendix A

02/28/2007 75	ORDER granting 72 Motion for Reconsideration. To the extent that prior rulings are inconsistent with this Order, those prior rulings are vacated. Entered by Judge John A. Gorman on 2/28/2007. (SM, iled) (Entered: 02/28/2007)
03/12/2007	TEXT ONLY ORDER: Supplemental final pretrial conference set for 3/27 will also include discussion of pending Supreme Court case BCI Coca Cola Bottling Co. v. EEOC, No. 06-341. Entered by Judge John A. Gorman on 3/12/07. (JB, iled) (Entered: 03/12/2007)
03/27/2007	Minute Entry for proceedings held before Judge John A. Gorman : Parties present in chambers by Attys Galassi/Russo/Davis for Supplemental Final Pretrial Conference/Status on Tuesday, 3/27/07. Current Trial Date of 4/23/07 is VACATED by agreement of the parties, due to the grant of cert in EEOC v. Coca Cola. Case is set for a Status Conference on 7/9/2007 at 10:00 AM by telephone (court will place call) before Magistrate Judge John A. Gorman. (SM, iled) (Entered: 03/28/2007)

Appendix A

04/20/2007		TEXT ONLY ORDER by Judge John A. Gorman: The Status Conference set for 7/9/07 is CANCELLED and RESET to 5/4/2007 at 10:00 AM by telephone (court will place call) before Magistrate Judge John A. Gorman. This conference is to discuss the dismissal of cert in the Cocoa-Cola case. Entered on 4/20/07. (WW, iled) (Entered: 04/20/2007)
05/04/2007		Minute Entry for proceedings held before Judge John A. Gorman: Parties present via phone by attys Galassi and Davis for Status Conference held on 5/4/2007 at 10:00 AM. Dft to file Motion for Leave to File Motion for Summary Judgment by 6/4/07 (Misc. ddl 6/4/2007). Plaintiff response due 6/19/07 (Other ddl 6/19/2007). Further Status Conference set for 6/28/2007 at 10:00 AM by telephone (court will place call) before Magistrate Judge John A. Gorman. (TK, iled) (Entered: 05/04/2007)
06/04/2007	*78*	MOTION for Leave to File *Motion for Summary Judgment* by Defendant Proctor Hospital.

	Responses due by 6/21/2007 (Davis, Roy) (Entered: 06/04/2007)
06/19/2007 *81*	RESPONSE to Motion re *78* MOTION for Leave to File *Motion for Summary Judgment* filed by Plaintiff Vincent E Staub. (Galassi, Julie) (Entered: 06/19/2007)
06/21/2007 *83*	ORDER by Judge John A. Gorman granting *78* Motion for Leave to File. Summary Judgment Motion is due 7/9/2007 with a Response dddl of 7/23/2007. Status Conference set for 6/28/07 is CANCELLED and RESET to 8/21/2007 at 10:30 AM by telephone (court will place call) before Magistrate Judge John A Gorman. Entered on 6/21/07. (WW, iled) (Entered: 06/21/2007)
6/21/2007	TEXT ONLY ORDER by Judge John A. Gorman. Clerk is directed to efile the motion for summary judgment found as an attachment to motion #78. The briefing schedule for summary judgment is amended as follows: the ddl for filing is moot as clerk will file the motion for summary judgment on 6/21/07. The response to the

		motion for summary judgment shall be filed by 7/6/07. Status conference remains set for 8/21/07 at 10:30 AM via phone. Entered on 6/21/07. (WW, iled) (Entered: 06/21/07)
06/21/2007	*84*	MOTION for Summary Judgment by Defendant Proctor Hospital. Responses due by 7/6/2007 (Attachments: *#1* Exhibit)(WW, iled) (Entered: 06/21/2007)
07/25/2007	*88*	RESPONSE to Motion re *84* MOTION for Summary Judgment filed by Plaintiff Vincent E Staub. (Galassi, Julie) (Entered: 07/25/2007)
8/16/2007	*90*	ORDER denying *84* Motion for Summary Judgment; finding as moot *87* Motion to Strike. Supplemental Scheduling Conference set for 8/21/2007 10:30 AM before Magistrate Judge John A. Gorman. Court to place the call. Entered by Magistrate Judge John A. Gorman on 8/16/2007. (see order)(CL, iled) (Entered: 08/16/2007)

Appendix A

11/09/2007 *93*	Response by Vincent E Staub *to Court's Proposed jury Instructions.* (Galassi, Julie) (Entered: 11/09/2007)
11/16/2007	Minute Entry for proceedings held before Magistrate Judge John A. Gorman: Parties present in chambers by Attys Julie Galassi/ Troy Platner and Attys Roy Davis/ Richard Russo for final pretrial conference at 1:30 p.m. on Friday, 11/16/07 - same held. Discussion held re: jury instructions. Counsel to submit Amended Witness List and provide the court with a statement of the case. Jury trial remains set at 9:00 a.m. on 1/7/08. (KB, iled) (Entered: 11/20/2007)
01/02/2008 *96*	OBJECTION *to Court's Instruction No. 6A* by Proctor Hospital. (Attachments: *#1* Exhibit Court's Instruction No. 6A) (Russo, Richard) (Entered: 01/02/2008)
01/04/2008 *98*	Response by Vincent E. Staub re *96* Objection *to Court's 6A Instruction and Position Regarding Admissibility of Evidence.* (Galassi, Julie) (Entered: 01/04/2008)

Appendix A

01/04/2008 *100*	ORDER re *98* Response filed by Vincent E Staub, *96* Objection filed by Proctor Hospital (See order). Entered by Magistrate John A. Gorman on 1/4/2008. (CL, ilcd) (Entered: 01/04/2008)
01/07/2008	Minute Entry for proceedings held before Magistrate Judge John A. Gorman: Parties present in open court by attys Julie Galassi and Troy Plattner with plaintiff Vincent E. Staub and attys Roy Davis and Richard Russo with Proctor Hospital representative Linda Buck for Jury Trial on 1/7/08 at 9:00 AM. Parties announce readiness. Oral motion by Dft to exclude witnesses - motion granted. Jurors called, selected, sworn. (8 jurors). Opening statements by parties. Evidence on behalf of plaintiff. Time for adjournment. Jury Trial continued to 1/8/2008 at 09:00 AM in Courtroom B before Magistrate Judge John A. Gorman. (Court Reporter N.M.) (TK, ilcd) (Entered: 01/07/2008)

Appendix A

01/08/2008	Minute Entry for proceedings held before Magistrate Judge John A. Gorman: Parties present in open court by attys Galassi and Plattner with plaintiff Vincent E. Staub and attys Davis and Russo with Proctor Hospital Representative Linda Buck for continued Jury Trial held on 1/8/2008 at 9:00 AM. Further evidence on behalf of plaintiff. Time for adjournment. Jury Trial continued to 1/9/2008 at 09:00 AM in Courtroom B before Magistrate Judge John A. Gorman. (Court Reporter N.M.) (TK, iled) (Entered: 01/08/2008)
01/09/2008	ORAL MOTION for Directed Verdict by Defendant Proctor Hospital. Responses due by 1/28/2008 (TK, iled) (Entered: 01/09/2008)
01/09/2008	Minute Entry for proceedings held before Magistrate Judge John A. Gorman: Parties present in open court by attys Galassi and Plattner with plaintiff Vincent E. Staub and attys Davis and Russo with Dft Proctor Hospital representative Linda Buck for continued Jury Trial on 1/9/08 at 9:00 AM. Further

	evidence on behalf of plaintiff. Plaintiff rests. Out of the presence of the Jury, Oral Motion by Dft for Directed Verdict. Motion Denied. Jury now present in open court. Evidence on behalf of defendant. Dft rests. Time for adjournment. Jury Trial continued to 1/10/2008 at 09:00 AM in Courtroom B before Magistrate Judge John A. Gorman. (Court Reporter N.M.) (TK, iled) Modified on 1/11/2008 (TK, iled). (Entered: 01/09/2008)
01/10/2008	ORAL MOTION for Directed Verdict by Defendant Proctor Hospital. Responses due by 1/28/2008 (TK, iled) (Entered: 01/11/2008)
01/10/2008	Minute Entry for proceedings held before Magistrate Judge John A. Gorman: Parties present in open court by attys Galassi and Plattner with Plaintiff Vincent E. Staub and attys Davis and Russo with Dft Proctor Hospital Representative Linda Buck for continued Jury Trial on 1/10/08 at 9:00 AM. Rebuttal evidence by Plaintiff. Plaintiff rests. Out of the presence of the jury, Oral Motion by

	Defendant for Directed Verdict. Court reserves ruling on Motion. Jury instruction conference held. Parties stipulate to amount of damages. Jury now present in open court. Closing arguments by parties. Jury instructions read to jury in open court. Four bailiffs sworn. Jury retires to deliberate at 12:55 PM. Jurors fed. Out of the presence of the jury, Court denies Defendant's Oral Motion for Directed Verdict. Jury returns to open court at 4:30 PM with verdict. (See verdict). Jury discharged from further consideration of the case.(Court Reporter N.M.) (TK, iled) (Entered: 01/11/2008)
01/10/2008 *102*	JURY VERDICT. 1). Has Plaintiff proved by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the Defendant's decision to discharge him? Yes. 2.) Has Defendant proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status: No. 3.) Under the law given you in these instructions, did the Defendant act willfully in

		violation of USERA in discharging Plaintiff? No. (TK, iled) (Entered: 01/11/2008)
01/11/2008	*104*	JUDGMENT in a civil case entered in favor of Plaintiff Vincent E Staub and against Defendant Proctor Hospital in the amount of $57,640.00. (TK, iled) (Entered: 01/11/2008)
01/15/2008	*110*	MOTION for Judgment NOV *or for New Trial* by Defendant Proctor Hospital. Responses due by 2/1/2008 (Russo, Richard) (Entered: 01/15/2008)
02/01/2008	*115*	RESPONSE to Motion re *110* MOTION for Judgment NOV *or for New Trial* filed by Plaintiff Vincent E Staub. (Galassi, Julie) (Entered: 02/01/2008)
02/11/2008	*118*	NOTICE OF APPEAL by Proctor Hospital. (Russo, Richard) (Entered 02/11/2008)
03/20/2008	*135*	REPLY to Response to Motion re *110* MOTION for Judgmeni NOV *or for New Trial* filed by Defendant Proctor Hospital. (CL, iled) (Entered: 03/20/2008)

04/01/2008	*138*	MEMORANDUM in Opposition re *184* MOTION for Leave to File *Reply*, *110* MOTION for Judgment NOV *or for New Trial* filed by Plaintiff Vincent E Staub. (Attachments: *#1* Exhibit A to Surreply, *#2* Exhibit B to Surreply) (Galassi, Julie) (Entered: 04/01/2008)
05/07/2008	*142*	ORDER: Defendants motion for judgment as a matter of law or for a new trial [#110] is denied. Plaintiffs' motion for attorneys fees [#116] is allowed; fees in the amount of $128,766.00 are awarded. Costs are assessed in favor of plaintiff in the amount of $2,178.19. The Clerk is directed to amend the judgment to reflect this fees and costs as stated herein. Entered by Magistrate Judge John A. Gorman on 5/7/8. (HK, iled) (Entered: 05/07/2008)
05/08/2008	*144*	AMENDED JUDGMENT (HK, iled) (Entered: 05/08/2008)
06/02/2008	*154*	ORDER by Magistrate Judge John A. Gorman: *145* Motion to Amend/Correct is DENIED and *150* Motion for Attorney Fees.

	Entered on 6/2/08 is GRANTED. The Clerk is directed to amend the judgment to reflect an award of attorneys fees to Plaintiff in the total amount of $153,095.50. (WW, iled) (Entered: 06/02/2008)
06/03/2008 *155*	SECOND AMENDED JUDGMENT. (KB, iled) (Entered: 06/03/2008)
04/28/2009 *166*	ORDER of USCA - On April 8, 2009, the plaintiff-appellee filed a petition for rehearing and petition for rehearing en banc. All the judges on the panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED. (FDT, iled) (Entered: 04/28/2009)
05/06/2009 *167*	MANDATE of USCA as to *118* Notice of Appeal *157* Notice of Appeal *146* Notice of Appeal filed by Proctor Hospital (Attachments: *#1* Notice of Issuance of Mandate, *#2* Short Mandate.(FDT, iled) (Entered: 05/06/2009)

05/07/2009	*168*	ORDER Entered by Magistrate Judge John A. Gorman on 5/7/09 re *167* USCA Mandate. Pursuant to the direction of the Seventh Circuit in Staub v. Proctor Hosp.,- F3d - No. 08-1316, March 25, 2009 (7th Cir.), the Clerk is directed to amend the Judgment in this case showing judgment in favor of Defendant and against Plaintiff. (FDT, iled) (Entered: 05/07/2009)
05/07/2009	*169*	THIRD AMENDED JUDGMENT in favor of Proctor Hospital and against Vincent E Staub. (FDT, iled) (Entered: 05/07/2009)

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MARCH 25, 2009

In The
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 08-1316, 08-2255, 08-2402

Vincent E. Staub,

Plaintiff-Appellee,

v.

Proctor Hospital, an Illinois corporation,

Defendant-Appellant.

Appeals from the United States District Court
for the Central District of Illinois

No. 04 C 1219 - **John A. Gorman,** *Magistrate Judge*

Argued December 11, 2008 – Decided March 25, 2009

Before Manion, Evans, and Tinder, *Circuit Judges.*

Evans, *Circuit Judge.* One would guess that the chances are pretty slim that the work of a 17th century French poet would find its way into a Chicago courtroom

in 2009. But that's the situation in this case as we try to make sense out of what has been dubbed the "cat's paw" theory. The term derives from the fable "The Monkey and the Cat" penned by Jean de La Fontaine (1621-1695). In the tale, a clever and rather unscrupulous-monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one. As understood today, a cat's paw is a "tool" or "one used by another to accomplish his purposes." Webster's Third New International Dictionary (1976). More on this a little later.

Vincent Staub sued the Proctor Hospital of Peoria, Illinois, under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C.§4301 *et seq.*, after he was discharged from his position as an angiography technologist. An Army reservist, Staub alleged that the reasons given—insubordination, shirking, and attitude problems—were just a pretext for discrimination based on his association with the military.A jury sided with Staub, and the district court denied Proctor's renewed motion for judgment as a matter of law or for a new trial. On appeal, Proctor argues that the court gave a faulty instruction regarding the "cat's paw" theory and, in connection with that error, improperly admitted evidence of animus by nondecisionmakers. The cat's paw theory, which we will discuss later in more detail, is a way of proving discrimination when the decisionmaker herself is admittedly unbiased; under the theory, the discriminatory animus of a nondecisionmaker is imputed

to the decision-maker where the former has singular influence over the latter and uses that influence to cause the adverse employment action. *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908 (7th Cir.2007). In addition to attacking the way the district court handled this theory, Proctor says the evidence was insufficient to support a verdict under it. Staub contests these arguments head-on, but he also says the premise is flawed. We need not analyze this as a cat's paw case, Staub claims, because there was evidence that there were *two* decisionmakers, one of whom was clearly prejudiced. We start with the facts viewed in the light most favorable to the verdict.

Staub was a veteran member of the United States Army Reserve. Like all reservists, he was a part-time soldier, spending the bulk of his hours in the civilian world. For Staub, that meant employment as an angio tech for Proctor. Balancing work and military duties can be a complicated task, but Staub apparently managed. For a while, at least. In late 2000, some 10 years after he was hired, things began to grow a little tense.[1]

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1. Though we start our narrative in 2000 —as that is when Staub alleges his military-based problems arose—Staub's employee file was already thick by that date. In 1998, Proctor fired Staub temporarily, as it turns out) for refusing to work past his scheduled shift. Staub was reinstated after filing a grievance, but with certain conditions in place. Those conditions addressed perecived weakness in availability, attitude, and communication. For instance, Staub was to communicate with his supervisor whenever he left his work area, and he was

(Cont'd)

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It was around that time that Janice Mulally, second in command of the Diagnostic Imaging Department, began to prepare the department work schedules. Staub would notify Mulally of his drill and training obligations, which occupied one weekend per month and two weeks during the summer. Before Mulally took over scheduling, Staub had weekends off. But Mulally placed Staub back in the weekend rotation, creating conflicts with his drill schedule. Mulally did this even though she had advance notice of Staub's military obligations, and when Staub approached her about the issue she became agitated. Beginning in 2000, the scheduling conflicts were only "occasional," but Mulally's attitude reflected a deeper problem. Mulally responded to Staub's questions by throwing him out of her office and saying she "didn't want to deal with it." Staub found some relief by going to department head Michael Korenchuk, yet it was far from complete. Sometimes Mulally would change Staub's schedule after Korenchuk spoke with her, but other times she would post a notice on the bulletin board stating that volunteers were needed to cover the drill weekends, portraying Staub as irresponsible. And occasionally Mulally made Staub use his vacation time for drill days or scheduled him for additional shifts without notice. Mulally made her reasons plain: She

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(Cont'd)

warned that "any insubordination, immature behavior, unprofessionalism or lack of support of [a] management decision[ ] w[ould] be grounds for immediate dismissal." This is relevant, as we shall see, because Proctor says Staub's latest termination was due to similar insubordination and shirking of duties.

called Staub's military duties "bullshit" and said the extra shifts were his "way of paying back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves." And it came as no surprise that Korenchuk did little to remedy the situation. Although Korenchuk only commented about Staub's reserve duties on a "couple different occasions," these comments were none too subtle. Korenchuk characterized drill weekends as "Army Reserve bullshit" and "a b[u]nch of smoking and joking and [a] waste of taxpayers ['] money."

Bad as that was, things became worse in 2003. In February of that year, Staub was called to active duty for a period of up to one year. Though unforeseen circumstances cut the tour short at the 92-day mark, Staub's return home was less than pleasant. Korenchuk told one of Staub's coworkers, Amy Knoerle, that Mulally was "out to get" Staub. Knoerle was at a loss because she saw nothing in Staub but a hard worker and team player. However, she noticed that whenever Staub approached Mulally about drill obligations, Mulally would roll her eyes and make sighing noises.

Knoerle left her post in July of 2003, to be replaced by Leslie Sweborg. Two weeks into the job, Sweborg met Mulally and another coworker, Angie Day, for drinks after work. Expecting nothing more than casual chit-chat, Sweborg was shocked when the conversation turned to Staub. Mulally was blunt: "She said that [Staub's] military duty had been a strain on the[ ] department" and "she did not like him as an employee."

So Mulally asked Sweborg "to help her get rid of him." Sweborg refused. In her opinion, Staub was always competent and professional, and there was no reason for such animosity.

Day, on the other hand, shared Mulally's dislike of Staub. In a departmental meeting on December 9, 2003, Day said Staub failed to train her properly and always seemed to "disappear" when help was needed. Sweborg defended Staub—saying he was a solid trainer and "just as available as any other tech in the department"—but Mulally shot her down. Mulally told Sweborg she "didn't know what [she] was talking about."[2]

In any case, the tide was turning against Staub, and his military obligations were at least peripherally involved. On January 9, 2004, Staub received an order to report for "soldier readiness processing," a precursor to another round of active deployment. Staub gave a copy of the order to both Korenchuk and Mulally, and Korenchuk became apprehensive. He asked Staub several times per week when he would have to ship out. Day had resigned by this point, leaving Sweborg and Staub as the only two angio techs. If Staub went on active duty, Korenchuk would have to use "rent-a-techs," placing strain on the department's budget.

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2. Apparently she did, at least to some degree. The very next day, Korenchuk completed Staub's annual evaluation, giving him an impressive score of 97.53 out of 100. To be fair, though, Staub's evaluations from years past were not so sparkling; his attitude, professionalism, and ability to work well with others were noted as constant weaknesses. *See supra* n. 1.

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One might think this enhanced Staub's job security, but not so. On January 27, 2004, Mulally gave Staub a written warning accusing him of shirking his duties. A bit of background information is necessary to understand what Staub allegedly failed to do, because it bore no connection to angiography. The Diagnostic Imaging Department (headed by Korenchuk) was divided into two units: one unit for angiography, and a far larger unit for traditional diagnostic imaging services like radiology, mammography, ultra sounds, CAT scans, and MRIs. Though they normally stuck to their speciality, angio techs were trained to work in both units and therefore had the ability to help out with radiology and the like when the need arose and the circumstances permitted. According to Mulally, however, Staub didn't respect that arrangement.

On the morning of January 26, a worker from general diagnostics called Mulally to see if any of the angio techs were free to help out. Mulally in turn called Sweborg and asked if she and Staub had any patients. Sweborg said they didn't and, according to Mulally, later admitted they were completely free from 8:30 to 9:45 a.m. Nevertheless, Sweborg and Staub failed to lend a hand. Mulally therefore issued Staub a written warning—Sweborg received one the next day—noting that he had already been warned about this behavior several times. But Staub and Sweborg dispute all that. They say they had an angio patient at 8:30 a.m., and although that case was ultimately cancelled by the doctor, they learned of the cancellation only 15 minutes prior to the call for help in general diagnostics, to which they

immediately responded. Further, according to Sweborg and Staub, they had never before been instructed to report automatically to general diagnostics if they did not have angio cases. Staub thus refused to sign the warning, and he asked Korenchuk (who approved the action) why he was being targeted. Korenchuk said Mulally "had all of the pertinent facts," and he just signed the warning "to get her off of his back." So the warning stood, and so did its instructions for the future. Going forward, Staub was to "report to Mike [Korenchuk] or Jan [Mulally] when [he] ha[d] no patients and [the angio] cases [we]re complete[d]." He would also "remain in the general diagnostic area unless [he] specified to Mike or Jan where and why [he would] go elsewhere."

This discipline of Staub emboldened Mulally. Shortly afterwards she called Staub's Reserve Unit Administrator, Joseph Abbidini, in Bartonville, Illinois.Mulally had called Abbidini on a prior occasion to confirm that Staub was actually a member of the Reserves, but now she wanted to know if Staub could be excused from some of his military duties. Mulally asked Abbidini if Staub really had to attend two-week training in the summer because he was needed at work. Abbidini stated that the training was mandatory. Most Reserve members have outside employment, he explained, so excusing Staub would set an ugly precedent. Mulally's response? She called Abbadini an "asshole" and hung up. (Again, we add that we are, as we are required to do at this stage of the proceedings, taking all facts in the light most favorable to Mr. Staub.)

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After all this, there can be little dispute that Mulally didn't like Staub, and that part of this animus flowed from his membership in the military. But it was *Day*'s beef with Staub—not Mulally's—that would ultimately get the ball rolling towards termination. On April 2, 2004, Day had a meeting with Korenchuk, Linda Buck (vice-president of Human Resources), and R. Garrett McGowan (chief operating officer). Day was upset with Korenchuk because she complained to him about Staub and he did nothing in response. Day said she had difficulty working with Staub, he would "absent himself from the department," and he tended to be "abrupt." After Day left the room, Korenchuk, Buck, and McGowan discussed what they should do. This wasn't the first time McGowan had heard about "availability" problems involving Staub, so he told Korenchuk to work with Buck to create a plan that would solve the issue. They never found time to do that—Staub ran into trouble again and was fired three weeks later on April 20.[3]

The day of reckoning started out normally enough. Staub and Sweborg worked together in the angio

3. Though it is clear Staub was fired on the 20th, there is some ambiguity as to whether the triggering event occurred that day. Staub, Sweborg, and Korenchuk said the event occurred on the 20th, but Buck claimed it happened on the 19th and said she mulled the situation over for a day before settling on a decision. We find the collective recollection of Staub, Sweborg, and Korenchuk more credible, but either way it has no effect on the outcome of the case.

department all morning, finishing up around lunchtime. Hungry, yet mindful of the prior warning, Staub walked to Korenchuk's office to tell him that he and Sweborg were going to lunch. But Korenchuk wasn't there. So Staub walked back to the angio suite, placed a call to Korenchuk's office, and left a voice mail informing him they were off to the cafeteria. Staub and Sweborg returned 30 minutes later and went to work on some left-over filming. Korenchuk showed up a few moments afterwards, demanding to know where they had been. He said he was "looking all over" for Staub, and Staub's explanation—that they were only at lunch and left a voice mail—appeased him little. Korenchuk escorted Staub down to Buck's office in Human Resources, picking up a security guard along the way. Korenchuk had met with Buck earlier in the day—informing her that Staub failed to report in as instructed and couldn't be located—so the decision to terminate was already made. As Staub walked into the room, Buck handed him his pink slip.The guard then escorted him off the grounds. Sweborg was not disciplined, though she resigned a few days later out of disgust.

According to the written notice, Staub was discharged for failing to heed the earlier warning instructing him to report to Korenchuk whenever he had no more work in the angio department and otherwise to remain in the general diagnostics area. Without the January 27 write-up, Day's April 2 complaint, and the event on April 20—all of which involved unavailability or "disappearances"—Buck said she would not have fired Staub. Buck's testimony makes

it clear that although she relied on Korenchuk's input, the ultimate decision was hers. Korenchuk "reluctantly agreed" with her decision, but it was her call to make.

Beyond consulting Korenchuk and reviewing the more recent incidents, Buck relied on past issues with Staub in making her decision. She said she heard "frequent complaints" about Staub during her first year with Proctor, 2001. And she knew of two workers who resigned because of Staub in 2002: an angio tech quit because Staub made her feel like "gum on the bottom of his shoe," and a registered nurse gave up for similar reasons. What's more, a recruiter told Buck she had difficulty attracting workers to angio because Staub "had a reputation." Among other things, he was known for flirting with medical students.

Admittedly, however, Buck failed to speak with other angio techs who worked with Staub, including Sweborg, and she had no idea that Mulally and Day wanted Staub fired. But Buck did review Staub's employee file, including the good (like his most recent annual evaluation) and the bad (like the January 27 write-up).

Staub filed a grievance following the termination. Staub insisted that the January 27 write-up—containing the command he allegedly violated—was fabricated by Mulally to get him in trouble. Buck did not follow up with Mulally about this claim—though she did discuss it with another Human Resources official—and she did not investigate Staub's contention that Mulally was out to get him because he was in the Reserves. Instead,

Buck stuck with her initial assessment: Staub, despite technical competency, didn't work well with others and deserved to be fired for insubordination. Staub's involvement with the military played no role in her analysis.

Against this backdrop, Staub faced an uphill battle in his USERRA discrimination suit. Like other employment discrimination legislation, USERRA prohibits adverse action based on a prohibited criterion, in this case military status. 38 U.S.C. § 4311(a), (c)(1). But also as with other discrimination legislation,a plaintiff suing under USERRA does not win by showing prohibited animus by just anyone. He must show that the *decisionmaker* harbored animus and relied on that animus in choosing to take action. Since Buck was the decisionmaker and there was no evidence *she* had a problem with Staub on account of his membership in the Reserves, Staub was out of luck under the traditional rubric. But that doesn't mean he had no case at all.

Deploying the cat's paw theory, Staub sought to attribute Mulally's animus to Buck, and therefore to Proctor. He posited that Mulally fed false information to Buck(i.e., that he dodged work on January 26, 2004); that Mulally was motivated to do this because he was a member of the Army Reserves; and that Buck relied on this false information (without vetting it any meaningful way) in deciding to fire him. The case made it to trial on this theory, where the jury apparently found it convincing, returning a verdict in Staub's favor. Pursuant to the parties' stipulaion, Staub was awarded $57,640 in damages. The court then denied Proctor's

renewed motion for a new trial or judgment as a matter of law.

Proctor argues on appeal that the district court mishandled the cat's paw theory (both in terms of instructing the jury and admitting certain evidence), and also that the evidence was insufficient. Before reaching those arguments, however, we must address Staub's invitation to review this not as a cat's paw case, but as a traditional discrimination suit. Staub attempts to skirt the cat's paw analysis by arguing that Buck was not the only decisionmaker. Staub says Buck shared that responsibility with Korenchuk, who admittedly made some anti-military remarks. If that were the case, it would not matter whether Buck acted as the cat's paw, because the jury could find that a decisionmaker *himself* was biased. *See* 38 U.S.C.§4311(c)(1);*Lewis v. City of Chicago*, 496 F.3d 645, 651-52 (7th Cir.2007); *Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544, 552-53 (8th Cir.2005). The problem with this theory is neither its logic nor even its lack of record support (though that's doubtful as well). Rather, the problem is that Staub failed to present this theory below,so it is waived on appeal. *See Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 608 n. 4 (7th Cir.2007). Even if the evidence did support this new theory, we would be disinclined to assume the jury entertained it because Staub presented his case only as a cat's paw matter. *See United States v. Ienco*, 92 F.3d 564, 570 (7th Cir.1996) ("[W]hen there is reason to doubt that the jury even considered the only proper theory under which the defendant can be convicted, the verdict cannot be upheld merely because we are confident that the jury would have convicted had it considered that

theory."). If Staub wanted to pitch two alternative theories at trial, he could have done so. But he chose to stick with the cat's paw, so now it sticks with him. And with that, we turn to the applicability of La Fontaine's "cat's paw" to 21st century federal anti-discrimination law.

In *Brewer*, we applied the cat's paw concept to discrimination law. That case dealt with the "Machiavellian world of permit parking at the University of Illinois's Urbana–Champaign campus, and the ill fortune of a student who became involved in it." 479 F.3d at 909. The student, Lonnell Brewer, was fired from his part-time job after he was caught with a modified parking tag. Brewer said his supervisor (Kerrin Thompson) gave him permission to modify the tag, and she kept this fact a secret because he was black and she wanted him fired. The evidence of animus on the part of Thompson was significant, to say the least. Just before Brewer got the boot, Thompson yelled, "I have had it with you nigger, get my tag!" Thompson, however, did not make the decision to terminate. The decision instead came from someone higher up the chain of command—Denise Hendricks—and there was no evidence that *she* harbored any racial animus. Under the normal discrimination framework, that would have been the end of the road for Brewer's case. But we held that his claim could survive if he showed Thompson used Hendricks as her cat's paw. We said,

> where an employee without formal authority to materially alter the terms and conditions of a plaintiff's employment nonetheless uses

> her "singular influence" over an employee who does have such power to harm the plaintiff for racial reasons, the actions of the employee without formal authority are imputed to the employer and the employer is in violation of Title VII.

Id. at 917. And we noted that this influence may be exercised by, among other things, "supplying misinformation or failing to provide relevant information to the person making the employment decision." *Id.*

So Brewer's case looked strong under this formula—there was evidence that Thompson was racist, and that she influenced Hendricks's decision by withholding the fact that she told Brewer he could park where he liked. But, alas, we held against Brewer. It wasn't fair to impute Thompson's animus to Hendricks, we concluded, because Hendricks looked into the situation for herself; though she "listened to the information Thompson relayed to her," she "did not simply rely on it." *Id.* at 919. From this we derived a simple rule to prevent the cat's paw theory from spiraling out of control:

> [W]here a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker.

Id. at 918. By asking whether the decisionmaker conducted her own investigation and analysis, we respected the role of the decisionmaker. We were, and remain to this day, unprepared to find an employer liable based on a nondecision-maker's animus unless the "decisionmaker" herself held that title only nominally. If the decision-maker wasn't used as a cat's paw—if she didn't just take the monkey's word for it, as it were—then of course the theory is not in play.

We affirmed this principle in *Metzger v. Illinois State Police*, 519 F.3d 677 (7th Cir.2008). Though we acknowledged the cat's paw as a viable theory in certain cases, we held that it was wholly inappropriate in Metzger's situation because there was neither evidence of singular influence nor proof that the decisionmaker's review was "anything but independent...." *Id.* at 682.

Measured against this precedent, we find that there was insufficient evidence to support a verdict against Proctor under the cat's paw theory. But before we explain why, it is necessary to comment on the way the trial court handled the matter. We do not fault the court much for its approach—the judge certainly did an admirable job given the dearth of case law—but we agree with Proctor that the division of labor between jury and court, if not the jury instruction itself, was legally defective.

Just before the case went to trial, Proctor filed motions *in limine* seeking to exclude evidence of military animus on the part of individuals, principally

Mulally, not involved in the decision to terminate. The court denied the motions, however, reasoning that the evidence was essential to the cat's paw theory. But the court agreed that animus by a nondecisionmaker is only relevant if she exercised singular influence over the decisionmaker, and it instructed the jury to that effect. The instruction read as follows:

> The Defendant is a corporation and can act only through its officers and employees. Animosity of a coworker toward the Plaintiff on the basis of Plaintiff's military status as a motivating factor may not be attributed to Defendant unless that co-worker exercised such singular influence over the decision-maker that the co-worker was basically the real decision maker. This influence may have been exercised by concealing relevant information from or feeding false information or selectively-chosen information to the person or persons who made the decision to discharge Plaintiff.
>
> If the decision maker is not wholly dependent on a single source of information but instead conducts its own investigation into the facts relevant to the decision, the Defendant is not liable for a non-decision maker's submission of misinformation or selectively chosen information or failure to provide relevant information to the decision maker. It does not matter that much if the information has come

> from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source.

This instruction, we think, is unwieldy—a fact-driven instruction would have been far more useful[4]—but not technically wrong. It captures the essence of *Brewer*, telling the jury that it can only consider nondecisionmaker animosity in the case of singular influence, and even then that the employer is off the hook if the decisionmaker did her own investigation. So we reject Proctor's challenge to the instruction itself. But a court faced with the cat's paw theory case should not just give an instruction and ask the jury to sort it all out. The court has a critical task to perform *before* giving the instruction or admitting evidence of nondecisionmaker animus—preferably at the summary judgment or *in limine* stage of the proceedings. Namely, the court should determine whether a reasonable jury could find singular influence on the evidence to be presented. If there is not sufficient evidence to support such a determination, then the court has no business admitting evidence of animus by nondecisionmakers. Admitting this sort of evidence would not only be technical legal error; it would likely be prejudicial

4 Instead of saying "the Defendant," for instance, the court could have said "Proctor," replaced "decision maker" with "Buck," and so on. Just as juries are ill-equipped to construe legalese—aren't we all!—they are more likely to understand instructions that use facts rather than abstract terms.

due to the jury's tendency to associate the nondecisionmaker's remarks with the employer, fairly or not.

As we say, however, we do not fault the court here for failing to perform this task. Nothing in *Brewer*, *Metzger*, or our other cases on the cat's paw, *see, e.g.*, *Byrd v. Ill. Dep't of Pub. Health*, 423 F.3d 696 (7th Cir.2005); *Schreiner v. Caterpillar, Inc.*, 250 F.3d 1096 (7th Cir.2001), impart guidance as to how a trial court should handle the theory. They say what the cat's paw requires, but nothing about the division of labor between judge and jury. Nevertheless, the approach we suggest—with the judge making a threshold determination of whether a reasonable jury could find singular influence before admitting evidence of nondecisionmaker animus—is supported in the law. Allowing the jury to entertain the cat's paw theory and decide whether there was singular influence, but only upon a prior determination that there is sufficient evidence for such a finding, is consistent with Federal Rule of Evidence 104(b). That rule instructs courts to admit conditionally relevant evidence—here, animosity by a nondecisionmaker—"upon ... the introduction of evidence sufficient to support a finding of the fulfillment of the condition." In other words, the jury could only properly consider evidence of animosity by Mulally (or any other nondecisionmaker) if the court determined that there was sufficient evidence to support a finding of singular influence by Mulally (or another) over Buck.

Because the trial court in this case did not follow this procedure, Staub's abundant evidence of Mulally's animosity was erroneously admitted into evidence. And this error was prejudicial because the strongest proof of anti-military sentiment came from the improperly admitted evidence.

The normal remedy for prejudicial evidentiary error is a new trial. *See United States v. Garcia*, 528 F.3d 481, 485 (7th Cir.2008). However, a new trial is not warranted where the properly considered evidence is insufficient to support the jury's verdict. In that case—assuming the losing party filed a Rule 50(b) motion for judgment as a matter of law or a new trial after the verdict, as Proctor did—judgment should be entered in its favor, *see* Fed.R.Civ.P. 50(b); *Tate v. Exec. Mgmt. Servs., Inc.*, 546 F.3d 528, 531 (7th Cir.2008); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir.2006) (citing *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S.Ct. 980, 163 L.Ed.2d 974 (2006)). Of course, the standard is steep. "A verdict will be set aside as contrary to the manifest weight of the evidence only if no rational jury could have rendered the verdict." *Moore ex rel. Estate of Grady v. Tuelja*, 546 F.3d 423, 427 (7th Cir.2008) (internal quotation marks omitted). Considering the evidence as a whole, we conclude that Proctor is entitled to judgment.

USERRA states that "[a] person who . . . has performed . . . service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment

by an employer on the basis of that . . . performance of service. . . ." 38 U.S.C. § 4311(a). A plaintiff suing under this Act must "demonstrate that he suffered an adverse employment action and that the adverse action was motivated in part by his military service." *Maher v. City of Chicago*, 547 F.3d 817, 824 (7th Cir.2008). *Cf.* 38 U.S.C. § 4311(c)(1) (explaining that an employer is not liable if, despite anti-military bias, it would have taken the action just the same). Staub failed to clear this bar.

The story told by the evidence is really quite plain. Apart from the friction caused by his military service, the evidence suggests that Staub, although technically competent, was prone to attitude problems. The fact that he made some friends along the way (such as Sweborg) doesn't diminish the fact that he offended numerous others for reasons unrelated to his participation in the Reserves. So, when Staub ran into trouble in the winter and spring of 2004, he didn't have the safety net of a good reputation. Even if Staub behaved reasonably on the day of his discharge and the January 27 write-up was exaggerated by Mulally, his track record nonetheless supported Buck's action. Most importantly, Buck took this action free of any military-based animus, which Staub admits. And the cat's paw is not applicable—even setting aside the evidentiary error—because a reasonable jury could not find that Mulally (or anyone else) had singular influence over Buck. To the contrary, the evidence established that Buck looked beyond what Mulally and Korenchuk said—remember, Korenchuk supported the firing only "reluctantly"—and determined that Staub was a liability

to the company. We admit that Buck's investigation could have been more robust, *e.g.*, she failed to pursue Staub's theory that Mulally fabricated the write-up; had Buck done this, she may have discovered that Mulally indeed bore a great deal of anti-military animus. But the rule we developed in *Brewer* does not require the decisionmaker to be a paragon of independence. It is enough that the decision-maker "is not wholly dependent on a single source of information" and conducts her "own investigation into the facts relevant to the decision" *Brewer*, 479 F.3d at 918. To require much more than that would be to ignore the realities of the workplace. Decisionmakers usually have to rely on others' opinions to some extent because they are removed from the underlying situation. But to be a cat's paw requires more; true to the fable, it requires a blind reliance, the stuff of "singular influence." Buck was not a cat's paw for Mulally or anyone else. Although Mulally may have enjoyed seeing Staub fired due to his association with the military, this was not the reason he was fired. Viewing the evidence reasonably, it simply cannot be said that Buck did anything other than exercise her independent judgment, following a reasonable review of the facts, and simply decide that Staub was not a team player. We do not mean to suggest by all this that we agree with Buck's decision—it seems a bit harsh given Staub's upsides and tenure—but that is not the issue. The question for us is whether a reasonable jury could have concluded that Staub was fired because he was a member of the military. To that question, the answer is no.

We REVERSE and REMAND with instructions to enter judgment in favor of Proctor.

APPENDIX C -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 28, 2009

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 28, 2009

Before

MICHAEL S. KANNE, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

JOHN D. TINDER, *Circuit Judge*

Nos. 08-1316, 08-2255 & 08-2402

VINCENT E. STAUB,

Plaintiff-Appellee,

v.

PROCTOR HOSPITAL, an Illinois corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.

No. 04 C 1219

John A. Gorman, *Magistrate Judge*

Appendix C

ORDER

On April 8, 2009, the plaintiff-appellee filed a petition for rehearing and petition for hearing en banc. All the judges on the panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS FILED MAY 7, 2008

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF ILLINOIS

Case No. 04-1219

Vincent E. STAUB,

Plaintiff

v.

Proctor Hospital,

Defendant

OPINION and ORDER

The parties have consented to have this case heard to judgment by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), and the District Judge has referred the case to me. Now before the Court are the Defendant's post-trial motion for judgment as a matter of law or for a new trial (Doc. # 110), the Plaintiff's motion for attorney's fees (Doc. # 117), and the Plaintiff's Bill of Costs(Doc. # 116) with objections (Doc. # 124). As explained more fully below, the motion for judgment as a matter of law or for a new trial is denied, the motion for attorney fees is granted in part and denied in part, and the Bill of Costs is modified.

Appendix D

MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR NEW TRIAL.

This case was tried to a jury, and a verdict in favor of Plaintiff in the amount of $57,640.00 was rendered on January 10, 2008. Defendant re-raises some of the same legal questions that were thoroughly considered in this Court's order denying summary judgment (See Order, Doc.# 90), as well as challenging the sufficiency of the evidence put forth by the Plaintiff during the trial. In addition, Defendant discusses a recent (i.e.post-trial) Seventh Circuit case involving the core legal doctrine in this case, the "cat's paw" theory. *Metzger v. Illinois State Police*, 519 F.3d 677 (7th Cir.2008).

On a motion for judgment as a matter of law under Fed.R.Civ.P. *50* or for a new trial under Fed.R.Civ.P. 59, a court must determine whether the evidence presented at trial, when viewed in the light most favorable to the non-moving party, is sufficient to support the verdict. *Mathur v. Bd. of Trustees of Southern Illinois University*, 207 F.3d 938 (7h Cir.2000). Although a mere scintilla of evidence is not enough to sustain a verdict, the court is not to substitute its view of contested evidence for the jury's view. *Id.* A jury verdict will not be set aside if, viewing the evidence in the light most favorable to the prevailing party, there exists within the record any reasonable basis to support that verdict; issues of credibility and weight of evidence are left to the jury. *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir.2004); *Harbor Motor Co. v. Arnell Chevrolet-GGco, Inc.*, 265 F.3d 638 (7th Cir.2001).

Appendix D

The legal questions raised by Defendant in this motion are no different than those previously considered, and nothing in the Defendant's motion convinces me that resolution or application of the legal questions was erroneous in any way. With only one exception, those legal issues will not be revisited here. That exception is the *Metzger* case and its impact, if any, on those legal questions.

After careful review, I conclude that *Metzger*[1] does not change the law that was applied in this case. First and foremost, *Metzger* involved review of an order on a motion for summary judgment; it was not a post-trial case, so its discussion of applicable standards of proof offers no insight into the standards that govern the motion now before this Court. Nor does *Metzger* reveal any errors that were made at the pre-trial or jury instruction phases of this case. As this Court's Order on summary judgment found, there were several key issues that could not be decided on summary judgment because there existed genuine and significant disputes of fact, necessitating a trial and resolution of those facts by the jury. Given the divergence between the procedural posture of *Metzger* and that in the case before this Court, I do not see that *Metzger* sheds any light on how the jury should have resolved such disputes of fact.

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1. *Metzger's* discussion of the cat's paw theory was *dicta* and hence would not overrule *Brewer* in any event. Given Defendant's reliance on that discussion, I have nonetheless carefully considered that discussion.

Appendix D

Nor did *Metzer* change the law of the cat's paw theory in any way. *Metzger* cites with approval *Brewer v. Bd. of Trustees of University of Illinois*, 479 F3d 908 (7th Cir.2007). *Metzger*, 519 F3d at 682. *Brewer* is the case that guided this Court not only in its resolution of the summary judgment motion but also in preparing the substantive jury instructions that were given. *Metzger* did not purport to change any aspect of *Brewer*, and nothing in Defendants' motion convinces me that application of *Brewer* in the Order on summary judgment or as reflected in the jury instructions was incorrect.

Defendant emphasizes that aspect of *Metzger* in which the employer's independent investigation was sufficient to belie any claim of "cat's paw." Whether the investigation conducted by Defendant was sufficient to meet the standard set forth in *Brewer* was held by this Court to be a question of fact, and it was one of the issues presented to the jury. In this case, the evidence about the investigation is sufficient to support the jury's verdict under both *Brewer* and *Metzger*.

First, the evidence at trial reveals a significant factual difference between *Metzger* and the case at bar. In *Metzger*, the employer's original decision and its reconsideration of that decision were both reduced to writing; the reconsideration clearly stated four independent sources of information that supported the decision. In the case at bar, however, the testimony and documentation about who said what to whom was hotly contested. At this procedural juncture, that contested

evidence must be considered in the light most favorable to Staub, not Proctor. As the Plaintiff properly comments, "The issue for the Court to consider is not what conclusions might be drawn solely considering Defendant's evidence, but whether evidence was presented from which the jury could have reasonably concluded that Defendant did not conduct an independent investigation, either before or after termination." See also, *Tate v. Executive Mgt. Svcs., Inc.*, — F.Supp.2d ——, 2007 WL 1650410 (N.D.Ind.2007). There was sufficient evidence for the jury to have determined that there was no truly independent investigation here. Moreover, given the testimony about Mike Korenchuk's role in both the original termination and the reconsideration, it was not inherently unreasonable or improper for the jury to have disbelieved crucial parts of testimony offered by the two decision makers, Linda Buck and Mike Korenchuk. Once again, issues of credibility are for the jury. Given the conflicting testimony, there was certainly a basis for the jury to have disbelieved or discounted at least some of the testimony proffered by Defendant. Once Buck's and/or Korenchuk's testimony was deemed suspect as to one issue, the jury could reasonably have disbelieved even uncontested testimony as not worthy of credence. See, *Harvey v. Office of Banks and Real Estate*, 377 F.3d 698 (7th Cir.2004)(where decisionmaker is impeached, it is jury's prerogative to disbelieve other uncontradicted testimony); *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627 (7th Cir.1996)(same). Viewing the evidence in the light most favorable to the Plaintiff, I find a sufficient basis for the verdict.

Appendix D

I reject Defendant's characterization of Plaintiff's evidence as a "scintilla" and of the remarks as "stray." There were a number of remarks, some of them temporally proximate to the discipline originally imposed on Plaintiff and others temporally proximate to his discharge. There were inconsistencies between the facts as various witnesses recalled them and as set forth in the documents related to the discipline. While there was no smoking gun, there was enough evidence to defeat summary judgment and there was enough evidence to send the case to the jury. The only way to overturn the jury's verdict here would be to substitute my judgment for the jury's on issues of credibility and weight, something I cannot and will not do.

I therefore conclude that there was sufficient evidence put on by the Plaintiff to sustain the jury's verdict. Defendant's motion for judgment as a matter of law or for a new trial is therefore denied.

MOTION FOR ATTORNEY FEES

Vincent Staub has moved for his attorney's fees in the amount of $145,271.00. The motion is supported by affidavits of the two attorneys who worked on this case, as well as by detailed time records.

A plaintiff who prevails under USERRA may be awarded attorney fees as well as reasonable costs[2]. A "prevailing party" for purposes of attorneys' fees

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2. Costs are discussed in the section below.

requires that the plaintiff have succeeded "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983, quoted in Farrar v. Hobby, 506 U.S. 103, 109 (1992).

Defendant does not dispute that Plaintiff is a prevailing party and hence is entitled to fees, and I find that Staub is a "prevailing party" for purposes of an award of attorney's fees.

Defendant does dispute the amount sought by Plaintiff. There 12 factors that have been identified by the Supreme Court as relevant to determining the proper amount of a fee in a civil rights suit. Those factors are: (1) the time and labor required;(2)the novelty and difficulty of the issues;(3)the skill requisite to perform the legal service properly;(4)preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or by circumstances; (8) the amount involved and the results imposed; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley*, 461 U.S. at 430 n. 3.

Once civil rights litigation "materially alters the legal relationship between the parties, the degree of the plaintiff's overall success is "the most critical factor" in determining the reasonableness of a fee award. *Hensley*,

461 U.S. at 424; see also *Farrar v. Hobby*, 506 U.S. 103 (1992)(relationship between the fees sought and the degree of success attained must be considered). If "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount ." *Hensley*, 461 U.S. at 436. On the other hand, where a plaintiff "substantially advanced their clients' interests by obtaining a significant concession, no reduction in fees was necessary. *Id.*.

In *Hensley*, the Court reviewed the varying standards applied by various courts to determine the proper amount of fees when a plaintiff achieved less than total recovery. One significant distinction made was the degree to which the unsuccessful claim were based on different facts and legal theories than the successful claims. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation ... In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley*, 461 U.S. at 435.

The *Hensley* Court also noted the difficulty and complexity of many civil rights suits involving "challenges to institutional practices or conditions", commenting:

> This type of litigation is lengthy and demands many hours of lawyers' services. Although the

> plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved."

Id.

Defendant argues that there were substantial issues on which Plaintiff did not prevail. Specifically, Defendant points out that the original complaint in this case included two state law tort claims, (retaliatory discharge against Proctor and tortious interference against Jan Mulally). This Court [3] declined to exercise supplemental jurisdiction over those two counts because of the novelty and complexity of the state law issues they raised. Those two counts were therefore dismissed without prejudice. Plaintiff refiled those claims in state court where they are still pending. The two state claims each pray for $250,000. According to Defendant, Plaintiff cannot prevail on those claims because the jury specifically found that Proctor did not willfully violate USERRA, and willfulness is an element of each of the two tort claims.

It must first be noted that the jury was not asked to consider whether Jan Mulally's conduct was willful,

3. The Order was entered by Judge McDade on January 20, 2005, prior to the parties' consent (on January 23, 2007) to Magistrate Judge jurisdiction in this matter.

so the claim against her is not barred by the verdict in this case, which found that Proctor Hospital's conduct was not willful.

More importantly, in the case at bar the facts underlying the federal USERRA claim and the state law claims were the same. Had those claims remained in this suit, it would have been impossible to separate out most of the work done on those claims from the work on the USERRA claim. It is also important to note that dismissal of the state law claims came relatively early in the case[4], so the bulk of the work accomplished related only to the claim that was ultimately successful. In this case, counsel's work was devoted to the litigation as a whole, and dividing out some of the hours is neither practicable nor necessary.

Moreover, as noted above, the degree of success attained is only one factor to be considered when evaluating a request for fees. The significance of the legal issue and the public purpose may also be considered, and in this case, I deem both of those factors to outweigh any possible reduction for less than total success. It is also impossible not to notice that this case took from June of 2004 to January of 2008 from onset to verdict. Certainly the length of time this case remained pending-through no fault of counsel, I might add-impacted the time available for Plaintiff's counsel to devote to other matters. Finally, as both the Court and

4. The case was filed on June 30, 2004. Less than 7 months later, the state law claims were dismissed without prejudice.

counsel learned during this case, the legal issues were not entirely clear-cut and indeed it became necessary to revisit those issues due to modifications in the case law the governed the case.

For each of these reasons, I find that a general reduction of fees is not called for in this case. Defendant also raises two specific objections to fees. First, Defendant argues that one dispute that arose during this case–the ramifications of the litigation on Plaintiff's wife, who was a nursing student–should not be included in any fee award. I agree. While it is true that the dispute arose as a direct result of this litigation, the dispute was wholly removed from the merits of the litigation, and its resolution had minimal effect if any on the outcome of this litigation. I do not believe fees for time spent by Plaintiff's counsel on this dispute are recoverable, and therefore reduce Plaintiff's prayer by $3,530.

Defendant next disputes the hourly rate sought by one of Plaintiff's attorneys, who billed at $175 per hour despite being a 2007 law school graduate, a rate Defendant asserts is excessive for this community. In a contingent fee case, such as this one, a higher rate may be charged. I do not find the $20 hourly difference between Plaintiff's associate attorney and Defendant's associate attorney to be problematic given that factor.

Defendant raises no other objections to the petition for fees. Accordingly, the motion for attorney fees is granted as follows: attorney's fees are awarded in the amount of $132,296.00 less $3530, for a total of $128,766.

Appendix D

BILL OF COSTS

Plaintiff seeks costs in the amount of $2,400.02. This amount includes online research ($133.23), and copies, fax and postage for attorney Mike Gifford ($98.60). Defendant objects to these costs as not recoverable under Rule 56.

I agree that these costs do not fall within costs which may be assessed under 29 U.S.C. § 1920. Accordingly, the costs are reduced to $2,178.19.

CONCLUSION

Defendant's motion for judgment as a matter of law or for a new trial [# 110] is denied. Plaintiff's motion for attorney's fees [# 116] is allowed; fees in the amount of $128, 766.00 are awarded. Costs are assessed in favor of plaintiff in the amount of $2,178.19. The Clerk is directed to amend the judgment to reflect this fees and costs as stated herein.

s/ John A. Gorman

JOHN A. GORMAN
UNITED STATES MAGISTRATE

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS ENTERED JANUARY 11, 2008

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS

Case Number: 04-1219

JUDGMENT IN A CIVIL CASE

Vincent E. Staub

vs.

Proctor Hospital,
an Illinois Corporation

JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict. Verdict entered 1/10/08 in that 1). Has Plaintiff by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the Defendant's decision to discharge him? Yes. 2). Has Defendant proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status? No. 3). Under the law given you in these instructions, did the Defendant act willfully in violation of USERA in discharging Plaintiff? No. Pursuant to oral stipulation of the parties, plaintiff's damages are $57,640.00.

Appendix E

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff and against Defendant in the amount of $57,640.00

ENTER this 11th day of January, 2008.

PAMELA E. ROBINSON, CLERK

s/ T. Keleh

By: DEPUTY CLERK

APPENDIX F — JURY SPECIAL INTERROGATORY

The jury must unanimously agree on the answers to all of these questions.

1. **Has Plaintiff proved by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the Defendant's decision to discharge him?**

   YES ✓ NO _____

If your answer to Question 1 is "no", sign and return this verdict form and do not answer any more questions.

If your answer to Question 1 is "yes", answer question 2.

2. **Has Defendant proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status?**

   YES _____ NO ✓

If your answer to Question 2 is "yes", sign and return this verdict form and do not answer any more questions.

If your answer to Question 2 is "no", answer question 3.

3. **Under the law given you in these instructions, did the Defendant act willfully in violation of USERRA in discharging Plaintiff?**

   YES _____ NO ✓

Appendix F

s/ Foreperson
Foreperson

s/ Juror

s/Juror

s/ Juror

s/Juror

s/ Juror

s/Juror

s/ Juror

APPENDIX G — MOTIVATING FACTOR INSTRUCTION TO JURY

A "motivating factor" is a factor that was relied on, taken into account, considered, or was otherwise used in making an employment decision. That factor need not have been the sole factor that motivated the decision.

APPENDIX H — CAT'S PAW INSTRUCTION TO JURY

The Defendant is a corporation and can act only through its officers and employees. Animosity of a co-worker toward the Plaintiff on the basis of Plaintiff's military status as a motivating factor may not be attributed to Defendant unless that co-worker exercised such singular influence over the decision maker that the co-worker was basically the real decision maker. This influence may have been exercised by concealing relevant information from or feeding false or selectively-chosen information to the person or persons who made the decision to discharge Plaintiff.

If the decision maker is not wholly dependent on a single source of information but instead conducts its own investigation into the facts relevant to the decision, the Defendant is not liable for a non-decision maker's submission of misinformation or selectively chosen information or failure to provide relevant information to the decision maker. It does not matter that much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source.

APPENDIX I — PLAINTIFF'S EXHIBIT 47, BUCK'S MEMORANDUM

Angie Day
Documentation of Incident on March 26, 2004

Angie Day came to Human Resources to file a complaint with HR the afternoon of March 26, 2004 (documentation attached).

She wanted us to be aware of Mike Korenchuk's behavior that day. She wanted Mike to know that his behavior was inappropriate.

After receiving the documentation, I contacted Garrett McGowan as Mike's supervisor to let him know what had occurred. A meeting was scheduled with Garrett, Angie Day and I for April 2, 2004.

During the meeting with Angie, she restated what she had already indicated in her documentation that she submitted to HR. She was very upset with the way that Mike treated her and she didn't feel he was taking her seriously. Mike had yelled at her in front of co workers and students.

He apologized but appeared very sarcastic and later made a gesture and kissing sound when he passed her in the hall. She was very offended at his behavior. Due to Mike's behavior, his failure to address issues with Vince Staub and Vince's behavior to her, she would no longer work for Proctor Hospital – as PRN or otherwise in angio.

Appendix 1

When asked about the issues with Angie, she indicated that Mike was aware of the problems. That Vince would disappear or not be available for long periods of time. And then he was very rude, abrupt with her. She gave an example of a time when she called in sick and he was questioning her in an accusatory tone about the time off.

She said she didn't have to work in an environment like that and she would no longer do it.

After Angie was done, we thanked her for her time and the information. Mike apologized for his behavior and indicated that it wouldn't happen again.

After Angie left, Garrett and I stayed with Mike. Garrett told Mike that a situation like this one was not to happen again. Mike acknowledged that.

Garrett went on to address the problems with Vince. He said continued problems with Vince were a reflection on Mike and his lack of leadership in the area. He told Mike that he was to put together a plan for addressing Vince's behavior. He was to put together a plan utilizing resources from HR and that he was to get it back to Garrett.

On April 19, 2005, Mike came to see me regarding his plan to deal with Vince. We didn't discuss the plan, because Mike told me that Vince was not in the department. Based on the disciplinary action done in January and the continuing problems, I said I thought we should terminate.

APPENDIX J — PLAINTIFF'S EXHIBIT 25, APRIL 20, 2004 TERMINATION NOTICE

Corrective Action

Verbal Written Suspension (Termination)

Employee Name Vince Staub Discussion Date 4/30/04
Employee Number 6958 Department Augio -373

	Patient Complaint		Safety Violation		Policy Violation
	Discourtesy		Quality of Work	X	Failure to Follow Instructions
X	Uncooperative		Quantity of Work		Improper Time Card Procedure
	Inefficient Use of Time		Tardiness		Other
	Personal Appearance		Excessive or Unauthorized Absence (s)		

(mark appropriate box with an X)

Explain in detail item or items checked. Please give date and time of specific incident.

Vince received a warning on 1/27/04 which stated, "Vince will report to Mike or Jon when they have no patients and cases are completed. He will remain in the general diagnostic area unless specifies to Mike or Jon where and why he will go elsewhere." To date Vince has ignored that directive.

Corrective Action

Termination effective immediately.

Has this employee been warned previously for a similar occurrence? (YES) NO (CIRCLE ONE PLEASE)

If YES, when did it occur? 1/27/04

Further incidents of this nature will result in corrective action, up to and including discharge.

Employee's Comments:

Employee refuses to sign
Employee Signature

Department Head Signature

Human Resources Director Signature

4/30/04
Date

EXHIBIT
1/8/08
25 Adm
(81-1259 w/o Obj

White Copy – Human Resources Canary Copy – Department Head Pink Copy – Employee

Revised 2/01

APPENDIX K — PLAINTIFF'S EXHIBIT 17, JANUARY 27, 2004 WRITTEN WARNING

Corrective Action

☐ Verbal ☒ Written ☐ Suspension ☐ Termination

Employee Name Vince Staub Discussion Date 11.22.04
Employee Number _____ Department Diagnostic Imaging - 373 Ang

	Patient Complaint		Safety Violation		Policy Violation
	Discourtesy		Quality of Work	X	Failure to Follow Instructions
	Uncooperative		Quantity of Work		Improper Time Card Procedure
	Inefficient Use of Time		Tardiness	X	Other - Lack of Cooperation
	Personal Appearance		Excessive or Unauthorized Absence (s)		

(mark appropriate box with an X)

Explain in detail item or items checked. Please give date and time of specific incident.

11.26.04 0944. Jan Mulcahy was called in MRI by Heather Dunne to ask for help from Angio Staff Techs. Jan called Angio - Leslie answered. Jan asked if they had cases - Leslie said no. Jan later determined via CT + Angio RN that at 0810 it was known there were no cases scheduled that am. Leslie was asked again (around noon) to confirm they had no patients between 0810 or 0830 to 0945. She confirmed that was true.

Corrective Action ~~Vince will report to Mike or Dan when they have no patients + cases are completed. He will remain in the General Diagnostic area unless specifics to Mike or Jan where and why he will go elsewhere.~~

Has this employee been warned previously for a similar occurrence? (YES) NO (CIRCLE ONE PLEASE)

If YES, when did it occur? several times - the last formal warning was 12/6/18.

Further incidents of this nature will result in corrective action, up to and including discharge.

Employee's Comments:

EXHIBIT 17 1/8/08 Adm 04 1219 JAG CR

Employee Signature Department Head Signature Mulcahy 11/29/04

Human Resources Director Signature 1-27-04 4pm Date 1-27-04

Vince will bring us his comments. This issue was discussed with him at 15:55 [12] 04

APPENDIX L — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS ENTERED JANUARY 4, 2008

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 04-1219

Vincent Staub,

Plaintiff

v.

Proctor Hospital,

Defendant

ORDER

One of the jury instructions in this case deals with the "cat's paw" theory, which is the heart of this case. The Court has considered the proposed jury instructions submitted by the parties and has drafted a Court's instruction. This instruction (Court's 6A) reads in its entirety:

> The Defendant is a corporation and can act only through its officers and employees. However, animosity of a co-worker toward the Plaintiff on the basis of Plaintiff's military status may not be attributed to Defendant unless that co-worker exercised such singular

> influence over the decision maker that the co-worker was basically the real decision maker. This influence may have been exercised by concealing relevant information from or feeding false or selectively-chosen information to the person or persons who made the decision to discharge Plaintiff.

This Instruction is based on the latest Seventh Circuit case to consider this theory, *Brewer v. Bd. of Trustees of the Univ. of Illinois*, 479 F3d 908 (7th Cir. 2007). Defendant has filed its objection to Court's 6A, and Plaintiff has filed his response to the objection. I have carefully considered the objection. For the following reason, the objection is overruled and Court's 6A will be given should this case go to the jury.

Defendant asserts that, *before* Plaintiff can put on evidence of *animus*, he must first show the requisite "singular influence" by the co-worker or other non-decision-maker over the decision makers. According to Defendant, the Court must rule on whether sufficient "singular influence" existed before *any* evidence of *animus* can be introduced.

I disagree. Singular influence is an essential element of Plaintiff's case. Failure to prove that element will necessarily result in judgment in favor of Defendant at the close of Plaintiff's case. Only if the Court determines at the close of Plaintiff's case that there is sufficient evidence of the degree of influence required by *Brewer* will any instruction at all be given; otherwise, the case

will be over. This situation is no different than any other case in which a plaintiff has failed to prove an essential element of his claim.

ENTER this 4th day of January 2008.

s/ John A. Gorman

JOHN A. GORMAN

UNITED STATES MAGISTRATE JUDGE

APPENDIX M — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS ENTERED AUGUST 16, 2007

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 04-1219

Vincent E. Staub,

Plaintiff

v.

Proctor Hospital,

Defendant

ORDER

The parties have consented to have this case heard to judgment by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), and the District Judge has referred the case to me. Now before the Court is the Defendant's second motion for summary judgment (Doc. # 84), along with Plaintiff's motion to strike (# 87) parts of a supporting affidavit filed by Defendant. As explained below, the motion to strike is moot and the motion for summary judgment is denied.

Appendix M

MOTION TO STRIKE

In light of new Seventh Circuit law, Defendant sought leave to file a second summary judgment motion. The proposed Motion for Summary Judgment was correctly attached as an exhibit to the motion for leave to file, a fact that was missed by the Court when the Motion for Leave to File was allowed. In the Order granting the Motion for Leave, the Court set out two parameters for the motion: that no new facts be presented and that the motion be limited to the effect of a new case on the prior order denying summary judgment.

When the Court's attention was directed to the already-submitted Motion for Summary Judgment, the Court, in the interests of efficiency, directed the Clerk to file it, even though it did not comply with those two requirements.

Defendants' Second Motion for Summary Judgment has introduced some supplemental evidence, which is the subject of the Plaintiff's Motion to Strike. The Court has no intention of considering evidence or statements of undisputed fact that were not submitted with the first motion for summary judgment. The scope of this Order is simply to assess the impact of the new Seventh Circuit case on the law of this case and how that law was applied to the facts in the record at the time of the first motion.

To the extent that defendant's motion—and hence plaintiff's response—go beyond that scope, the Court

is simply ignoring the submissions and argument. Plaintiff's motion to strike (# 87) is therefore moot. It is noted, however, that the evidentiary question raised in this motion regarding Buck's supplemental affidavit may, if necessary, be raised and briefed in an appropriate motion in limine.

BACKGROUND

The facts of this case were set out in previous Orders and will not be repeated herein except as necessary to explain the Court's ruling. In that Order, the Court called into question Proctor's evidence about the legitimacy of the decision to terminate Staub's employment, noting that there was evidence of a conspiracy by some of his co-workers to have him fired, statements by co-workers and Mulally indicating a problem with his military service, and an instance of more favorable treatment of a non-military co-worker. The Order summarized the record as being "well documented" that Mulally had negative opinion about Staub's military service, as well noting that she possessed a "strong influence" over Korenchuk, one of the decision makers and surmising that it would be reasonable to conclude that both decision makers, Korenchuk and Buck, were "colored by the situation involving" Angie Day. The extent to which the decision to terminate Staub's employment was colored by the negative attitudes of Mulally and Staub's co-workers was therefore a question of fact sufficient to defeat the summary judgment motion.

This case hinges on Plaintiff's "cat's paw" theory. Under this theory, the actions, words and motivations

of employees without formal authority to materially alter the terms and conditions of a plaintiff's employment may be imputed to the employer if the employee without formal authority exercises "singular influence" over an employee who does have such power. *Rozskowiak v. Arlington Heights*, 415 F.3d 608, 613 (7th Cir.2005). As applied to this case, the issue is whether the bias of non-decision maker Mulally and the co-workers may be imputed to Buck and Korenchuk, who (apparently together) possessed and exercised their authority to terminate the employment of Plaintiff. In particular, the issue is whether is whether Mulally possessed the requisite degree of "singular influence" over Buck's and Korenchuk's joint decision to terminate Plaintiff's employment.

After the Order denying the first Motion for Summary Judgment had been entered, the Seventh Circuit decided *Brewer v. Bd. of Trustees of the University of Illinois*, 479 F.3d 908 (7th Cir.2007)[1]. The parties disagreed about whether *Brewer* changed the law in this Circuit or whether it merely clarified and summarized it. A second summary judgment motion was authorized by this Court to ascertain whether *Brewer* required any changes to the prior Order.

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1. A Petition for Writ of Certiorari in *Brewer* is pending as of the date of this Order. 2007 WL 1789015, June 19, 2007 (U.S.). Actually, before the Seventh Circuit decided *Brewer*, the Supreme Court had accepted cert in another case presenting the precise issue about the cat's paw theory as is presented in this case and as was discussed in *Brewer*. The instant case was stayed pending the Supreme Court's ruling. After *Brewer* was decided, the *Coca Cola* case was dismissed by the parties.

Appendix M

THE BREWER CASE

In *Brewer*, a university student/employee alleged that the University had violated Title VII when it fired him from his student job (and ultimately removed him from a master's degree program) for allegedly violating university parking requirements. Specifically, he was fired for altering a parking tag. He claimed that his supervisor had given him permission to use the tag but then, due to racial bias, failed to tell her supervisor that she had given him permission. His supervisor did not have authority to terminate his employment, so the issue was whether his supervisor's bias was attributable to the person who actually made the decision to fire him.

The Seventh Circuit continues to apply the "cat's paw" theory to employment cases. As the Court noted in *Brewer*: "In the right context, what one employee says or doesn't say about another will control an employee's wages and chances for promotion, or may even get an employee fired." 479 F3d at 917. The requisite influence may be supplying misinformation or failing to provide relevant information to the decision maker. *Id.*

The *Brewer* Court went on to emphasize, however, that not any minimal amount of influence will do. The influence must be "singular," which the Court of Appeals defined as "so much influence as to basically be herself the true functional decision maker." *Id.*, quoting *Little v. Ill.Dept. of Revenue*, 369 F .3d 1007, 1015 (7th Cir.2004). "The nominal decision-maker must be nothing more than the functional decision-makers' cat's paw."

Brewer, 479 F.3d at 917-18, quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir.1990).

Proceeding from that definition of the cat's paw theory, the *Brewer* Court expounded on conduct that could be seen as sufficient to justify application of the theory. For example, where the party nominally responsible for an employment decision is, by virtue of her role in the company, "totally dependent on another employee to supply the information" on which the decision is based, the employee responsible for supplying the information is the "true, functional decision maker." *Brewer*, 479 F.3d at 918. Obviously, where the decision-maker conducts only "perfunctory review" or "mere paper review" of the information provided, that review does not let the employer off the hook. Rather an "independent investigation" of that information is required. *Id.* at 919. As the *Brewer* Court explained:

> where a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker. It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source.

Id. at 918.

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In *Brewer*, the biased supervisor withheld information from the decision maker. The employee had failed to bring his side of the story to the decision maker. The decision maker examined the allegedly-altered document and found that it had in fact been altered. On that basis, the employee's employment was terminated. The Seventh Circuit found that the employer's investigation of the facts was sufficient to cut the link between the biased supervisor's apparent racism and the decision that was made by the higher-level decision-maker. *Id.* at 918. See also, *Mullikin v. Indiana-Kentucky Elec. Corp.*, 2007 WL 1464256, Apr. 25, 2007 (S.D.Ind.)(Decision maker interviewed witnesses and plaintiff about incident, thereby satisfying *Brewer*'s requirement of an independent investigation). Cf. *Tate v. Executive Management Services, Inc.*, No. 105-CV-47-TS 2007 WL 1650410, *4, June 4, 2007 (N.D.Ind.)(sufficient evidence to support the jury's finding that decision maker acted as rubber stamp for biased employee, where there were disputed facts about whether there had been an investigation at all and where employee testified he was not allowed to speak with decision maker about allegations of misconduct).

Finally, the *Brewer* Court noted that, while a "lesser degree of influence" might be sufficient in other contexts (such as formal performance evaluations), such minimal influence is not sufficient in the context of discipline for misconduct. In such situations, such as where a biased employee has leveled false charges of misconduct, the employer is not liable under Title VII so long as an independent investigation is conducted before discipline is imposed. *Id.* at 920.

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The Seventh Circuit concluded its discussion by acknowledging that some of its prior "cat's paw" cases were not completely clear, and by rejecting those earlier cases which had suggested or held that any amount of influence, no matter how small or attenuated and regardless of investigation by the employer, is sufficient to impose liability on the employer.

DISCUSSION

The case at bar is about discipline for misconduct: the stated reason for termination of Staub's employment was his failure to comply with departmental regulations. The only issues for purposes of this motion is whether Mulally, who was not the decision-maker, possessed the requisite degree of "singular influence" over Buck and Korenchuk, the decision-makers and whether the requisite investigation was conducted.

This Court has previously held that the evidence would support a conclusion that Mulally's influence was "strong" and that evidence suggests that both Buck and Korenchuk could have been colored by Day's expressions of dissatisfaction with Staub. The degree of Mulally's influence is also suggested by the fact that after Staub was fired Mulally managed to have Day re-hired. That evidence is enough at this stage to create issues of fact which only a jury can resolve.

Not considered by the Court in the earlier Order, however, was evidence of whether an investigation was conducted by either one of the decision-makers and, if

so, what constituted that investigation. The information provided by Mulally was reflected at least to some degree in Staub's personnel file: Mulally had prepared the disciplinary notice and it was in the file. While it appears that Buck reviewed Staub's personnel file, there is nothing in the record to indicate whether either Korenchuk or Buck obtained any knowledge independent of what was provided by Mulally, except for the information provided by Day. And there is no evidence that either Day or Korenchuk investigated Day's statements. Buck appears to have simply relied on the material in Staub's personnel file and on Korenchuk's inability to locate Staub on the date in question.

I find that there remains a question of fact about the degree of Mulally's influence and the adequacy of the investigation, if any, conducted by Korenchuk and Buck before Staub's employment was terminated. Accordingly, the motion for summary judgment is denied in its entirety. This case is set for a supplemental scheduling conference on August 21, 2007 at 10:30 a.m. at which time dates for final pretrial conference and trial will be set.

ENTER this 16th day of August, 2007.

s/ John A. Gorman
JOHN A. GORMAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX N — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS ENTERED JUNE 21, 2007

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 04-1219

Vincent Staub,

Plaintiff

v.

Proctor Hospital,

Defendant

ORDER

The parties have consented to have this case heard to judgment by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), and the District Judge has referred the case to me. Now before the court is defendant's motion (Doc. #78) for leave to file a summary judgment motion. For the following reasons, the motion is granted.

This motion is brought before the Court in a case presenting an unusual procedural posture. Defendant's prior motion for summary judgment was denied. The Supreme Court then granted cert in a case presenting the precise legal issue that would govern the jury

instructions in this case, a theory of imputed employer liability referred to as the "cat's paw" theory. *Coca Cola Bottling Co. v. EEOC*, — U.S.—, 127 S.Ct. 852 (2007). The precise issue was stated as follows:

> Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee?

This case was then stayed by agreement of all concerned, pending the ruling in the *Coca Cola* case. While the *Coca Cola* case was pending, the Seventh Circuit issued a decision clarifying this Circuit's law on the "cat's paw" theory. *Brewer v. Bd. of Trustees of the University of Illinois*, 479 F.3d 908 (7th Cir. 2007). Thereafter, the Supreme Court dismissed cert in *Coca Cola*. 127 S.Ct. 1931.

At issue now is the effect of *Brewer* on this Court's prior order denying summary judgment. Defendant contends that *Brewer* significantly changed the law that governs this case, and that the Court should therefore reconsider that prior ruling. Plaintiff, on the other hand, contends that Defendant exaggerates the effect of Brewer. In addition, Plaintiff asserts that, even if the applicable law has changed significantly on this one issue, the Court's prior order on summary judgment contained several bases for its ruling, bases that remain unchanged in light of *Brewer*.

Appendix N

It would be unwise to proceed to trial in this case without a clear understanding of the effect of *Brewer* on the facts of this case. Deciding that effect in the context of the instant motion would do injustice to the search for that understanding; a more complete discussion - such as would be presented in a motion for summary judgment - is required. That discussion may reveal that defendant has mis-interpreted *Brewer*, in which case *Brewer* will nonetheless guide the substance of the jury instructions given. Conversely, that discussion may reveal that plaintiff's evidence is insufficient to withstand summary judgment, thereby negating the need for trial. Either way, both justice and efficiency are served by allowing supplemental argument on this definitive issue.

Plaintiff's assertion that there were other bases for the denial of summary judgment is not borne out by the prior Order. Each issue discussed in that order was influenced to some degree by the state of the law on the "cat's paw" theory in the Seventh Circuit at that time. A great deal of that law was debunked as careless language or dicta in *Brewer*. In the absence of the cat's paw theory, it appears that plaintiff's case would have failed at the summary judgment stage. Now that this theory has been re-articulated by the Seventh Circuit, it would not only be appropriate but necessary to review each issue in light of that law.

It also is not entirely clear whether - and if so the extent to which - the legal standard varies depending on the context of the adverse employment action.

Appendix N

Defendant argues that *Brewer* makes a distinction between a case that arises out of a formal performance evaluation and one arising out of employee misconduct. That distinction has not been addressed in earlier rulings. Even if there is such a distinction, which of those two standards applies to the facts of this case has not yet been argued.

I therefore conclude that it would be proper to reconsider the law of this case, given the intervening *Brewer* case. See, *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 572 (7th Cir. 2006)(appropriate to reconsider where there has been a change or clarification of governing law). The motion for leave to file a summary judgment motion is therefore granted, as follows.

Defendant shall file its motion for summary judgment on or before July 9, 2007. The statement of undisputed facts shall be identical to the statement included in its prior motion, including supporting evidence and references to that evidence. Plaintiff's response shall be filed on or before July 23. His response to Defendant's statement of undisputed facts and any additional material facts shall also be identical to what was submitted in response to the earlier motion. No reply shall be allowed.

The status conference on June 28 is cancelled and reset to August 21, 2007 at 10:30, by telephone. The Court will place the call.

APPENDIX O — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS ENTERED FEBRUARY 28, 2007

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 04-1219

Vincent Staub,

Plaintiff

v.

Proctor Hospital,

Defendant

ORDER

Now before the Court is the joint motion (#72) by the parties to reconsider prior rulings on motions in limine. That motion is allowed, and prior rulings are clarified or modified as stated herein.

FACTUAL BACKGROUND

The Diagnostic Imaging Department at Proctor Hospital includes the Angiography Lab, where plaintiff had been employed as a technician in the Angiography Lab since 1990. He was fired in 1998; his termination was grieved and reversed, and he was re-hired with conditions. From that point until January 27, 2004, his

personnel file contains nothing noteworthy as to his disciplinary record or job performance.

At all times during his employment, Staub was a member of the United States Army Reserves. Prior to 2003, his duties had consisted of monthly weekend drills and a 2 week drill during the summer. In 2003, he received an SRP order, which is the precursor to active duty. He served 3 months active duty in 2003. He received a second SRP during the 3d week of January 2004.[1]

During Staub's employment, the Department was supervised by Michael Korenchuk. Jan Mulally was in charge of scheduling for the department. The Vice President of Human Resources was Linda Buck. Both Korenchuk and Buck were involved in the decision to terminate plaintiff's employment.

In December of 2003, Defendant claims that the technicians were advised that whenever they had no cases, they would be expected to assist in other areas of the Department; Staub and Sweborg both dispute that they were ever so advised. On January 27, 2004, Staub and Sweborg were issued Corrective Action Notices for failing to perform duties by assisting another department. These Notices were prepared by Mulally and signed by Korenchuk.

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1. There appears to be a dispute about whether Proctor received copies of one or both of these SRP orders. This dispute is immaterial to the motions in limine.

Appendix O

On April 20, 2004, Staub and Sweborg were working together. According to Korenchuk, he was unable to find Staub in the Diagnostic Imaging Department. Korenchuk reported this to Buck; on that same date, Buck and Korenchuk delivered a notice of termination of employment to Staub. Sweborg was not disciplined at all. Staub unsuccessfully grieved this termination.

Each year, Staub would provide his Reserve schedule to Mulally. There is evidence that Mulally would at times ignore that schedule and place Staub on the schedule when he was unavailable. Instead of taking him off the schedule, she would sometimes require him to find a replacement. Other times, she would request volunteers, or assign his hours to someone else, practices that seemed to create some hard feelings among some of the other technicians. There is also evidence that Mulally called Staub's Reserve unit several times asking them to change his drill dates so he could work at the hospital. During one of those calls, she purportedly became irate and swore at the Reservist with whom she was speaking. There is also evidence that Korenchuk made some negative remarks about Staub's military duties and on at least one occasion refused to give him addition time needed for travel when he was training in Minnesota.

Staub claims in this lawsuit that his 2004 termination resulted from persistent discrimination on the basis of his supervisor's and co-worker's dislike of the burden his Reserve duties placed on the Department. This is alleged to violate the Uniform Services Employment and

Reemployment Rights Act (USERRA), 28 U.S.C. 4301 et seq. Under this statute, plaintiff must show that his military status was one of the reasons for his discharge.

MOTIONS IN LIMINE

Several of Plaintiff's co-workers will be offered as witnesses at trial. Some of the proposed testimony by three of these co-workers - Leslie Sweborg, Angie Day, and Amy Trone - are the subject of the defendant's motions in limine. In addition, plaintiff's motion in limine asks for exclusion of negative performance reviews or comments that (1) were not known by the decision-makers and/or (2) preceded the January 27, 2004 discipline.

DEFENDANT'S FIRST MOTION IN LIMINE

Defendant asked to bar any testimony or other evidence regarding Mulally's *animus* toward Staub, because of irrelevance. According to defendant, Staub cannot show that Mulally concealed information from or provided false information to Buck; her *animus*, if any, is therefore irrelevant to this case. Defendant also asserts that even if she had provided false information, the "taint" from such information was eliminated when Staub "took advantage of the opportunity to dispute said information" by means of the grievance procedures.

Mulally was not the decision maker, so her *animus* is legally irrelevant unless there is more. The animus of

a non-decision-maker is only imputed to the decision maker where:

> the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to influence the decision. In such a case, the discriminatory motive of the other employee, not the autonomous judgment of the nondiscriminating decision-maker, is the real cause of the adverse employment action.

Maarouf v. Walker Mfg. Co., 210 F.3d 750, 754 (7th Cir. 2000).

According to defendant, Mulally did not feed false information or conceal relevant information from Buck. Rather, the underlying facts on which the January discipline was based were admitted to be true by Staub in his grievance; he simply disputed whether those facts supported the discipline.

Plaintiff's response points first to defendant's misapprehension that Buck was the only decision maker. There is evidence - noted in the Order denying summary judgment - that the decision to discharge Staub was made jointly by Buck and Korenchuk. If Mulally misled Korenchuk who then brought inaccurate information into the decision making process, then Mulally's *animus* can be imputed to the decision makers.

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Evidence of Mulally's *animus* is admissible unless something comes out at trial that definitively cuts the link between her and Korenchuk. There may be evidence that she influenced Korenchuk, and that she either withheld information or provided him false or misleading information; there may well be evidence to the contrary. The jury must decide any credibility issues and then conclude whether Mulally's *animus* played a part in the decision. To exclude all such evidence would be to exclude significant evidence of *animus* of someone who appears to have had the ear of a person who may have been one of the decision makers.

None of this testimony is barred at this time. It may be renewed during trial if the evidence at trial would justify such renewal.

DEFENDANT'S SECOND MOTION IN LIMINE

Defendant asks that Sweborg be barred from offering testimony about *animus* of either Mulally or Angie Day, because (1) Sweborg has no basis for claiming that any such *animus* was based on Staub's military status; and/or (2) because Day had no involvement in the decision to discharge Staub.

Sweborg's testimony will allegedly include recounting of an incident when Mulally and Day made disparaging statements to her about Staub and tried to get her to join them in getting him fired. These statements occurred at a bar, where the three women went about two weeks after Sweborg began her

employment with Proctor, in July of 2003. In addition, one of them had remarked in Sweborg's presence that Staub's military obligations "strained the department." [It is not clear whether this comment was made in the bar or at some other time].

Angie Day resigned from Proctor in January 2004. In her exit interview with Buck, she purportedly cited her difficulties with Staub as one of the reasons for her resignation.

According to Defendant, Sweborg has not said and has no basis for saying that any of these comments were based on Staub's military status, so they are wholly irrelevant to this litigation. This argument is based on the misapprehension that each witness who testifies about events that happened must be able to link those events to an anti-military *animus* on the part of the actor. Sweborg does not have to be the one to make a "link" between anti-military *animus* and the conduct she observes in order to testify about that conduct. The conclusion whether there was such an *animus* is the jury's to draw; whether the witness knows anything about such a motive would be proper cross examination but has nothing to do with admissibility.

As far as Day's animosity, Day testified in her deposition that the only time she "took call"(i.e. worked outside ordinary scheduled hours) was when Staub was on military duty - she said she felt like she got his "leftovers." Day apparently did not want to "take call"

and there is evidence indicating that whenever she had to do so, she complained that she had to cover his call. According to Plaintiff, Day's complaints directly linked the "inconvenience" to Staub's military service.

In addition, Day conveyed her concerns to Buck when she resigned, so Day's complaints were known by Buck when she made the decision to terminate Staub's employment. While Defendant argues that Day played no part in the decision to terminate Staub, to the extent her animosity conveyed misleading information to Buck, it may be attributable to Buck under the case law cited above.

Moreover, the admissibility of Sweborg's testimony about what either Mulally or Day said to her is partially dependant upon their testimony. If it becomes necessary to impeach either of them as to what they said to Sweborg, plaintiff may use Sweborg to complete impeachment.

Sweborg's testimony cannot be barred at this time. Whether it is admissible is dependant on other witnesses' testimony. If there is evidence at trial that would justify re-visiting this question, defendant may re-raise it.

DEFENDANT'S THIRD MOTION IN LIMINE

Defendant asks to bar testimony of Staub's co-worker Amy Trone, who will say that in the 2 years prior to her leaving Proctor, she observed Mulally's reaction

when she had to re-do the schedule for the department due to Staub's military commitments . On those 3 to 5 occasions, she witnessed Mulally rolling her eyes back and sighing ("huffing and puffing") and "making a big deal" of having to change the schedule because of his commitments. Trone left Proctor's employ 6 months before Staub was fired.

According to defendant, Trone's testimony will consist "solely" of her subjective belief that Mulally's *animus* was on account of Staub's military status. In addition, defendant argues that her observations are too attenuated temporally to constitute evidence that the January 27 discipline issue resulted from that *animus*.

There is a distinction here between Trone testifying about her observations and testifying about her interpretation of Mulally's motive. Clearly she can testify about what she observed (if it is relevant and otherwise admissible). But for her to conclude that Mulally's body language was motivated by her anti-military *animus* towards Staub is obviously speculation and therefore impermissible.

As far as the temporal proximity, that is a basis for cross examination. The six months that elapsed between Trone's observations and Staub's discharge is not sufficiently long as to make the testimony too dated to be relevant.

Trone's testimony will be allowed as stated above.

Appendix O

PLAINTIFF'S MOTION IN LIMINE

Plaintiff's motions seeks exclusion of four categories of evidence:

> (1) any negative complaints of Staub's job performance or behavior prior to the January 27, 2004, discipline, other than testimony from Korenchuk and Day;
>
> (2) any performance reviews or testimony about them, predating January 2004;
>
> (3) any evidence of plaintiff's June 1998 termination; and
>
> (4) any notes or references from plaintiff' personnel file predating January 2004.

According to plaintiff, the termination notice stated a single reason for his termination: that he ignored the warning he received on January 27. Because this was the only reason given for his termination, plaintiff argues that evidence about his performance prior to that date is irrelevant. This is a question of weight, not admissibility.

Anything in Staub's personnel file can come in, subject to cross examination and one limitation: there will be no mini-trial or emphasis on the 1998 termination. There is no dispute that he was fired in 1998, nor that he successfully grieved the termination and was rehired.

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Any conditions that were imposed in the re-hiring obviously did not play a role in the January 2004 events and did not raise any concerns in the intervening 5+ years. So while mention may be made of that event, it shall be limited to a brief description as just stated.

The same is true with respect to criticisms or complaints about Staub that do not appear in his personnel file: to the extent that such evidence (1) rebuts plaintiff's "satisfactory performance" evidence and (2) was considered by Buck and/or Korenchuk in evaluating Staub's job performance , it is not barred by this Order. Whether any specific evidence mentioned in the motion is or is not admissible must await presentation of evidence at trial. At this time, however, the evidence is not barred.

CONCLUSION

The parties' motion for reconsideration is granted as stated herein. To the extent that prior rulings are inconsistent with this Order, those prior rulings are vacated.

ENTER this 28th day of February 2007

s/ John A. Gorman

JOHN A. GORMAN

UNITED STATES MAGISTRATE JUDGE

APPENDIX P — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS ENTERED AUGUST 1, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

Case No. 04-1219

VINCENT E. STAUB, Plaintiff,

Plaintiff,

v.

PROCTOR HOSPITAL, an Illinois Corporation

Defendant.

ORDER

Before the Court are Defendant Proctor Hospital's Motion for Summary Judgment [Doc. # 34] and Plaintiff Vincent Staub's Response [Doc. # 40]; Plaintiff's Motion to Strike Sections of Affidavit of Linda Buck [Doc. # 39]; and Plaintiff's Motion to Strike Exhibit 1 of Supplemental Affidavit of Linda Buck [Doc. # 45]. For the reasons that follow, Defendant's motion will be denied, and Plaintiff's motions will be denied as moot.

Appendix P

I.

Background

For the purposes of this summary judgment motion, the following facts, where disputed, are considered in the light most favorable to the non-moving party. Plaintiff Vincent Staub (Staub) has been a member of the United States Army Reserve since 1984. Staub began work as an angiography technologist (angio tech) for Defendant Proctor Hospital (Proctor) in 1990. He was terminated from that position on April 20, 2004. Staub claims his termination to be the end result of persistent discrimination on the part of his supervisors and co-workers, due to their dislike of his duties as a member of the Army Reserve and the burden that those duties placed upon the hospital.

The angiography lab at Proctor Hospital is part of the Diagnostic Imaging Department. Throughout the time period in question, the Diagnostic Imaging Department was supervised by Michael Korenchuk. The record shows that the de facto direct supervisor for the angio techs during that time was Jan Mulally. (Pl.'s Resp., Doc. # 40 Ex. 5 at 7; Ex. 4 at 3-4.) Mulally was also in charge of scheduling for the department. (*Id.* Ex. 3 at 15.)

Staub's disciplinary record while an employee of Proctor Hospital is as follows: Staub was terminated once previously, in June 1998. This termination was for refusal to continue working past the end of his shift.

Def.'s Mot. Summ. J., Doc. # 34 at 3, ¶ 14-16.) Staub filed a grievance and was reinstated pursuant to signing a document listing certain conditions. *Id.* On January 27, 2004, Staub was issued a Corrective Action Notice for failing to perform his duties by assisting another department. (Pl.'s Resp., Doc # 40 at 5.) This notice was prepared by Jan Mulally and signed by Michael Korenchuk. Pl.'s Resp., Doc # 40 Ex. 3 at 36-38.) Leslie Sweborg, a fellow angio tech who was with Staub during the incident, received a largely identical Corrective Action Notice the following day. (*Id.* Ex. 3 at 39.) On April 20, 2004, after not being able to find Staub in the Diagnostic Imaging Department, Korenchuk was advised by Vice President of Human Resources Linda Buck to terminate him. (Buck Aff., Doc # 37 at 43.) Sweborg had worked side by side with Staub that day and would have also been absent from the Department, but she was never disciplined. (Pl.'s Resp., Doc. # 40 Ex. 7 at 59-60, 113 (Sweborg Dep.).) Staub was fired in a meeting with Buck and Korenchuk later that day.

Defendant Proctor Hospital has a written policy of complying with the Uniformed Services Employment and Reemployment Rights Act (USERRA). Despite this, Mulally, who was in charge of scheduling during Staub's tenure at Proctor, would often place Staub on the schedule when she knew that he had Reserve commitments. (Pl.'s Resp., Doc # 40 at 12-13.) Rather than removing him from the schedule, she would often force him to find his own replacement, request volunteers to fill his hours, or simply assign his hours to other angio techs. This had the effect of breeding

resentment and animosity toward Staub among his co-workers. *Id.* Mulally also called Staub's Reserve Unit several times asking them to change his drill dates so he could work at the hospital. During one of these phone calls she became irate and swore at Joseph Abbadini, the Reservist with whom she was speaking. *Id.* at 16. Staub's supervisor Michael Korenchuk also has made negative remarks regarding Staub's military duties, and refused to give Staub additional time necessary for travel when he was training in Minnesota. (Pl.'s Resp. Ex. # 40 at 80.)

Mulally's animosity toward Staub is alleged to have extended to a conspiracy among hospital staff. According to Sweborg, Mulally and Angie Day attempted to recruit her to their effort to make Staub look bad, because they did not like him and wanted him to be fired. (Pl.'s Resp., Doc. # 40 Ex. 7 at 12-13.) Day resigned in January 2004, after a public confrontation with Korenchuk. Day cited Staub's behavior as one of the reasons for her resignation. (Pl.'s Resp., Doc # 40 Ex. 5.) Mulally later facilitated Day's rehiring to the angio lab at Proctor, seven days after Staub was terminated. (*Id.* Ex. 4.)

Following his termination, Staub brought this suit against Proctor, alleging, among other things, that the disciplinary actions taken against him on January 27, 2004 and April 20, 2004, and his termination from Proctor were the result of his service in the Army Reserve, in violation of the USERRA. Proctor has filed the present motion for summary judgment.

Appendix P

II.

Legal Standard

Summary judgment is to be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed.R.Civ.P. 56.* The moving party has the burden of showing the court, through portions of the record, that no genuine issue as to any material fact exists and that they are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may meet this burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986); *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir.1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Celotex*, 477 U.S. at 324. Nevertheless, this Court must "view the record and all inferences drawn from it in the light most favorable to the [non-

moving party]." *Holland v. Jefferson Nat. Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir.1989). Summary judgment will be denied where a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir.1995).

III.

Analysis

Under the USERRA, an employee must show that a protected status or activity was one of the reasons for the employer's action against him. 20 C.F.R. § 1002.22. If he can do so, the employer then has the burden to show that it would have taken the action regardless of the employee's protected affiliation or activity. *Id.* Among the protected activities under the USERRA is "[p]erformance of service, application for service, or obligation for service in a uniformed service." 20 C.F.R. § 1002.23.

Staub has presented evidence that the disciplinary actions taken against him were at least partially influenced by his military service. There is sworn testimony indicating a conspiracy to cause Staub to be fired from his job at Proctor. This alone does not present an issue of material fact as to the claim under the USERRA. However, a genuine issue becomes apparent once it is combined with Staub's evidence concerning the attitudes and conduct of some of the alleged conspirators in relation to his military service. In

addition, while Proctor points to other military staff who have received no discipline, as well as non-military staff terminated for the same reasons they claim Staub was terminated, there is no evidence that these individuals worked in the same department and under the same supervisors as Staub. Further, Staub has presented evidence that Sweborg, a non-military staff member working in the same department, was treated more favorably as she too was out of her work area at the time in question and was not terminated. Since Staub's claim is based on discrimination from direct supervisors and co-workers which was imputed to those who made the decision to terminate him, this distinction is important.

The question of whether Staub's termination is the result of discrimination due to his military service has been shown to be one of fact, not of law. Taking all facts in the light most favorable to the non-moving party, a reasonable jury could determine that Staub's written discipline and termination were caused at least in part by his military service, and that Proctor would not have taken such actions were it not for his military service, in violation of the USERRA. The evidence presented by the two sides indicates important factual inconsistencies which must be clarified before a jury, not simply in an exchange of memoranda.

As Defendant Proctor notes in its brief, the Seventh Circuit has stated that "[s]ummary judgment is generally improper where the plaintiff can show that an employee with discriminatory animus provided factual

information or other input that may have affected the adverse employment action." *Dey v. Colt Construction & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir.1994). This line of reasoning looks to whether Buck or Korenchuk acted as the "cat's paw" for one of the discriminating employees. "[W]hen a biased employee makes a discriminatory statement in the context of a plaintiff's performance review an evaluation that may be passed along to the decision maker the subordinate's attitudes become relevant to the discrimination calculus." *Mateu-Anderegg v. Sch. Dist. of Whitefish Bay*, 304 F.3d 618, 627 (7th Cir.2002) (concurring opinion). While Plaintiff Staub has not shown a direct link between his termination and those employees he argues showed animosity toward him, he has demonstrated enough of a causal connection between the events leading to his termination and the discriminatory actions of those employees that summary judgment at this stage would not be proper.

Mulally' s negative opinion of Staub' s military service and the effects of that service on the hospital is well documented in the record. It is also well-documented that Mulally had a strong influence over Korenchuk's disciplinary decisions involving Staub. In at least one instance, Korenchuk signed off on a written warning to Staub prepared entirely by Mulally, with no personal knowledge of any infractions that may have transpired. According to Korenchuk, Mulally discussed with him (Korenchuk) her desire to get rid of Staub, and often complained to Korenchuk about Staub. (Pl.'s Resp., Doc # 40 Ex. 3 at 17.) Therefore, it may be

the case that her animosity toward Staub was transferred to Korenchuk, who is undisputedly one of the two people who made the decision to terminate Staub. Trone's sworn deposition also corroborates the belief that Mulally seemed to want to get rid of Staub. Because of the evidence showing her dislike of Staub's military service, this general animosity towards him can be construed as discrimination based on Staub's protected status as a member of the Army Reserve.

In addition, it is reasonable that the opinions of both Buck and Korenchuk were also colored by the situation involving Angie Day. Due to her involvement in the alleged conspiracy against Staub, there is a factual question as to whether statements she gave upon her resignation were truthful, and also whether those statements tainted the decision-makers in Staub's firing with her apparent prejudices. Because she also is in the evidentiary record as having made negative statements about Staub due to his military service and how that service affected her and the hospital, there is a connection between her discrimination and this cause of action. Therefore, taking all facts in the light most favorable to Staub, his burden for making a prima facie claim under the USERRA has been met.

Proctor, under this interpretation of the facts, has not shown that Staub would have been fired regardless of his military service, which is required for a defense against this USERRA action. They dispute the vast majority of the facts in Section I. Their claim is that the hospital is in full compliance with the USERRA, and the

actions taken against Staub are solely the result of his conduct during his tenure at Proctor, not having any bearing on his military service. They have supplemented that position with sworn affidavits, deposition testimony from hospital personnel, and exhibits which they feel indicate the legitimate and lawful reasons for Staub's termination. However, all of this testimony has been called into question by the evidence presented by Staub. Therefore, there are several material issues of fact in play in this case, and judgment as a matter of law would be inappropriate.

Even taking into consideration the sections of the affidavit of Linda Buck [Doc. # 37]and the exhibit to that document [Doc.# 37 Ex. 1] that Plaintiffs have moved to strike, this Court finds that summary judgment would be inappropriate. Therefore, Plaintiff's Motions to Strike [Doc. # 39 and 45] are moot.

IT IS THEREFORE ORDERED that Proctor's Motion for Summary Judgment [Doc. # 34] is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike Sections of Affidavit of Linda Buck [Doc. # 39] and Plaintiff's Motion to Strike Exhibit 1 of Supplemental Affidavit of Linda Buck [Doc. # 45] are denied as moot.

IT IS FURTHER ORDERED that this case is set for a final pretrial conference on September 14, 2006 at 10:30am. The Parties are to meet with Judge McDade's law clerk at 9:30am on that day to discuss jury

instructions. The Parties are directed to submit a joint proposed final pretrial order on or before September 8, 2006. A jury trial date will be set during the final pretrial conference.

Entered this *1st* day of August, 2006.

s/ Joe B. McDade
JOE BILLY McDADE
United States District Judge

PETITIONER'S BRIEF

No. 09-400

IN THE

Supreme Court of the United States

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?

PARTIES

The petitioner is Vincent E. Staub. The respondent, Proctor Hospital, is a subsidiary of Proctor Healthcare, Inc.

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OPINIONS BELOW

The March 25, 2009 opinion of the Court of Appeals for the Seventh Circuit, which is reported at 560 F. 3d 647 (7th Cir. 2009), is set out at pp. 30a-51a of the Joint Appendix. The April 28, 2009 order of the Court of Appeals, denying rehearing and rehearing en banc, which is not reported, is set out at p. 52a-53a of the Joint Appendix. The May 7, 2008 opinion and order of the District Court, which is unofficially reported at 2008 WL 2001935 (C.D.Ill. 2008), is set out at pp. 54a-65a of the Joint Appendix. The January 4, 2008, order of the District Court, which is not reported, is set out at pp. 76a-78a of the Joint Appendix. The August 16, 2007 order of the District Court, which is unofficially reported at 2007 WL 2566259 (C.D.Ill. 2007), is set out at pp. 79a-87a of the Joint Appendix. The June 21, 2007 order of the District Court, which is not reported, is set out at pp. 88a-92a of the Joint Appendix. The February 28, 2007 order of the District Court, which is not reported, is set out at pp. 93a-103a of the Joint Appendix. The August 1, 2006 order of the District Court, which is not reported, is set out at pp. 104a-114a of the Joint Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on March 25, 2009. A timely petition for rehearing and rehearing en banc was denied on April 28, 2009. The petition for writ of certiorari was filed on July 22, 2009. Certiorari was granted on April 19, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4303(4)(A) of 38 U.S.C., a provision of the Uniformed Services Employment and Reemployment Rights Act, provides:

> [T]he term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—(i) a person, institution, organization or other entity to whom the employer has delegated the performance of employment-related responsibilities.

Section 4303(13) of 38 U.S.C. provides in pertinent part:

> The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty ....

Section 4311(a) provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

Section 4311(c) of 38 U.S.C. provides in pertinent part:

> An employer shall be considered to have engaged in actions prohibited — (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service. . . .

STATEMENT OF THE CASE

Hostility to Staub's Reservist Status

At the time of the events giving rise to this action Vincent Staub was[1] a First Sergeant in the United States Army Reserves, in which he had served since 1984. Staub was the Noncommissioned Officer In Charge of the Department of Radiology at either the 801st Combat Support Hospital at Fort Sheridan, Illinois, or the 114th Combat Support Hospital at Fort Snelling, Minnesota. His obligations to the Reserves require him to work for his Reserve Unit—to "drill"—one weekend a month and to train full time for an additional two to three weeks each year. Like reservists generally, Staub was also obligated to respond when recalled by the Army to active duty. He was called to active duty in early 2003 in connection with Operation Iraqi Freedom, and served for several months at Ft. Stewart/Ft. Gordon Georgia, instructing Army personnel on how to establish a Radiology unit in a field hospital in a combat environment.

For fourteen years prior to his dismissal Staub was an angiography technician in the Diagnostic Imaging Department of the Proctor Hospital in Peoria, Illinois, responsible for assisting physicians in a variety of medical procedures, including angiography, angioplasty, and stenting.[2] In late 2000 Janice Mulally became the

1. In August 2009 Staub retired as a member of the Army Reserves, having served for almost twenty-five years. Staub remains subject to being recalled to active service.

2. Record, Vol. 5 at 322-26.

second in command of the Department[3], and was "the de facto supervisor for the angio techs." (JA 105a). She "was also in charge of scheduling for the department." (*Id.*). Over time Mulally grew increasingly hostile to Staub's service in the Reserves.[4] "Mulally's negative opinion of Staub's military service and the effects of that service on the hospital is well documented in the record." (JA 111a).[5]

Prior to Mulally's appointment Staub had weekends off, and thus was able without difficulty to meet his obligation to train with his unit one weekend per month. But Mulally placed Staub back in the weekend work rotation, which necessarily created conflicts with his drill schedule.[6] "Mulally did this even though she had advance notice of Staub's military obligations."

---

3. "The record shows that the de facto supervisor for the angio techs . . . was Jan Mulally. . . . Mulally was also in charge of scheduling for the department." (JA 105a).

4. The Statement of the Case summarizes the evidence adduced at trial in support of Staub's claims. There was conflicting testimony regarding many of the important factual allegations. For example, Mulally and Korenchuk (the head of the Department) disputed testimony that they had made remarks and taken actions indicating hostility towards Staub's military service.

5. There was, the court of appeals acknowledged "abundant evidence of Mulally's animosity" (JA 49a), and at least "part of this animus flowed from [Staub's] membership in the military." (JA 38a). See JA 49a (testimony regarding Mulally was "the strongest proof of anti-military sentiment"), 81a (record is "'well documented' that Mulally had negative opinion about Staub's military service").

6. Record, Vol. 5 at 333.

(JA 33a).[7] When Staub raised the issue with her, "Mulally responded to Staub's questions by throwing him out of her office and saying she 'didn't want to deal with it.'" (*Id.*).[8] "[O]ccasionally Mulally made Staub use his vacation time for drill days or scheduled him for additional shifts without notice." (*Id.*). In addition, "[s]ometimes Mulally . . . would post a notice on the bulletin board stating that volunteers were needed to cover the drill weekends, portraying Staub as irresponsible." (*Id.*). Her actions "had the effect of breeding resentment and animosity toward Staub among his co-workers." (JA 106a-07a; see JA 95a).

> Mulally made her reasons plain: She called Staub's military duties "bullshit" and said [having to work] the extra shifts were his "way of paying back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves."

(JA 34a). Mulally's own supervisor, Michael Korenchuk, "told one of Staub's coworkers, Amy Knoerle, that Mulally was 'out to get' Staub." (*Id.*).

> Bad as that was, things became worse in 2003 [when] Staub was called to active duty . . . Staub's return home was less than pleasant. . . . [W]henever Staub approached Mulally about drill obligations, Mulally would roll her eyes and make sighing noises.

(*Id.*). When Staub attempted to discuss his Reserve obligations with Mulally, she told him to "get the

7. See Record, Vol. 5 at 334.

8. See Record, Vol. 5 at 335.

F— out" and referred to his Reserve duties as "bullshit."[9]

In July of 2003 Mulally complained to several of her subordinates that Staub's "military duty was a strain on the [] department," and sought assistance to "get rid of him." (JA 34a-35a). In early 2004 Mulally called the administrator of Staub's Army Reserve unit, Joseph Abbidini, to ask if Staub could be excused from some of his military duties. When Abbidini explained that the training was mandatory, Mulally "called Abbidini an 'asshole' and hung up." (JA 37a; see JA 95a, 107a). Mulally scheduled Staub to work during every one of his drill duty weekends in 2004, as well as during the period when he was required to report for soldier readiness training, in anticipation of being recalled to active duty.[10] There was "abundant evidence of Mulally's animosity." (JA 49a).

The head of the Department, Michael Korenchuk, on a number of occasions also repeatedly expressed hostility towards Staub's reserve duties.

> [T]hose comments were none too subtle. Korenchuk characterized drill weekends as "Army Reserve bullshit" and "a b[u]nch of smoking and joking and [a] waste of taxpayers[']] money."

(JA 34a). Korenchuk further complained that Staub's 2003 call-up in support of Operation Iraqi Freedom had

9. Record, Vol. 5 at 335, 338.

10. Record, Vol. 5 at 375.

been costly to the hospital, and he expressed unhappiness that Staub's anticipated deployment in 2004 would also be expensive for the employer.[11]

Despite the hostility of these officials Staub had an excellent evaluation in December 2003, only four months prior to his dismissal. Staub received the highest possible rating in 9 of 10 categories, and had the same overall rating as Mulally.[12]

The Events Leading to the Dismissal of Staub

The dismissal of Staub involved two related events in early 2004. In late January 2004—two weeks after Staub informed his supervisors that he was likely to be recalled to active duty—Mulally issued a serious (and hotly disputed) "Corrective Action" discipline to Staub and Leslie Sweborg, another angiography technician, a disciplinary order that later played a key role in the dismissal of Staub. There was considerable evidence that the Corrective Action contained and was based on statements which Mulally well knew to be false.[13] Mulally

11. Record, Vol. 5 at 124-25, 352.

12. Record, Vol. 3 at 91, 131-34.

13. Mulally based that disciplinary action on the asserted improper failure of Staub and Sweborg to assist with diagnostic imaging procedures outside the Angiography Lab. Mulally claimed that on the date and time in question Staub and Sweborg had no patient of their own in the Angiography Lab, and had flatly refused to assist in other procedures. Staub and Sweborg testified that none of that was true. Mulally grounded the disciplinary action on the supposed existence of a standing

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personally signed the "Corrective Action," which was cosigned by Korenchuk and a Human Resources official. (JA 75a).[14] That directive ordered Staub (and Sweborg) never to leave the diagnostic area "unless [he] specified to [Korenchuk] or [Mulally] where and why [he should] go elsewhere." (JA 37a).

The second incident occurred on April 20, 2004, the day Staub was fired[15]; here too the key facts were the subject of conflicting testimony. According to Staub and Sweborg, after working all morning in the Angiography Lab, they finished at lunch time and decided to go to lunch. Mindful of the January warning, they went to Korenchuk's office, but he was not there; Staub then called and left a voicemail on Korenchuk's phone, explaining that he and Sweborg would be in the hospital cafeteria. Staub and Sweborg returned to the Angiography Lab within 30 minutes and went back to work. Korenchuk showed up a few moments afterwards,

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order that all angiography technicians were to go the general diagnostic imaging unit whenever there was no angiography patient. Staub and Sweborg testified there was no such standing order, and that they had a patient in the Angiography Lab at the time in question. (JA 36a-37a).

14. Record, Vol. 5 at 168.

15. Buck insisted that the incident occurred on the 19th, and that pursuant to her invariable practice she had waited 24 hours before firing Staub. Korenchuk as well as Staub and Sweborg testified that the incident occurred on April 20. The court of appeals, assuming a somewhat unusual role, "f[ou]nd the collective recollection of Staub, Sweborg, and Korenchuk more credible." (JA 38a).

demanding "to know where they had been." (JA 39a). Korenchuk then escorted Staub to the office of Linda Buck, the Vice President for Human Relations,

> picking up a security guard along the way. . . . [T]he decision to terminate was already made. As Staub walked into the room, Buck handed him his pink slip. The guard then escorted him off the grounds.

(*Id.*). Buck testified that Korenchuk never told her that Staub had left a voicemail message when he and Sweborg went to lunch.[16] Sweborg was not disciplined. (JA 39a).

Staub subsequently filed a grievance contesting his termination, and asserting, *inter alia*, that the critical January 27 warning "was fabricated by Mulally to get him in trouble." (JA 40a).[17] "Buck did not follow up with Mulally about this . . . and she did not investigate Staub's contention that Mulally was out to get him because he was in the Reserves." (JA 40a). "Buck . . . failed to pursue Staub's theory that Mulally fabricated the write-up." (JA 51a). Had Buck investigated, "she may have discovered that Mulally indeed bore a great deal of anti-military animus." (JA 51a; see JA 40a ("Buck failed to speak with other angio techs who worked with Staub")).

16. Record, Vol. 5 at 71, 108.

17. See Record, Vol. 3 at 59 63.

Proctor's Accounts of Role of Korenchuk and Mulally In the Dismissal

The basis of the decision to dismiss Staub, and the role played in that decision by Korenchuk and Mulally, were disputed at trial. The immediate triggering event was a meeting on April 20, 2004 when Korenchuk went to Buck's office and made a statement to Buck about Staub's asserted failure to report in before leaving his work station. In making her decision Buck relied, at least in part, on the January 27 directive, whose existence Staub claimed had been orchestrated by Mulally. Buck had no personal knowledge regarding Staub's actions on April 20 or the matters described in the January 27 Corrective Action. There was conflicting evidence as to what else occurred on the day in question.

When Staub was dismissed on April 20, 2004, Buck filled out a "Corrective Action" sheet setting forth the reason for the termination. That form required her to "explain in detail" the reasons for her action. Her handwritten explanation was as follows:

> Vince received a warning on 1/27/04 which stated, "Vince will report to Mike or Jan when they have no patients and cases are completed. He will remain in the general diagnostic area unless specifies to Mike or Jan where and why he will go elsewhere." *To date Vince has ignored that directive.*

(P.X. 25, JA 74a)(emphasis added). The last sentence indicated that at the time of the dismissal Buck believed—presumably on the basis of what Korenchuk had just told her—that Staub had never complied at all

with the January 27 directive during the period of almost three months since it was issued. At trial Buck testified that Korenchuk told her Staub "never reported in," and that the explanation in the "Corrective Action" was "the reason why [Staub] was terminated."[18]

Korenchuk, on the other hand, did not testify that Staub had never reported in, or that he had so informed Buck. Rather, Korenchuk insisted that he had told Buck on April 20 that Staub on that particular date had left his work station and been impossible to locate.[19] Buck, on the other hand, insisted that Korenchuk had never told her that Staub had reported in by leaving a voicemail for Korenchuk.[20]

At trial, Buck described a number of other supposed problems in Staub's work history. Buck stated that she reviewed Staub's personnel file only after the decision to dismiss Staub had been made. Korenchuk, on the other hand, testified that other problems were discussed before the dismissal decision.[21] None of these other matters were listed on the contemporaneous "Corrective Action" sheet. That form clearly called for a complete account of the reasons for the disciplinary action described. The form contained 14 separate boxes (such as "discourtesy" or "policy violation") that the

18. Record, Vol. 5 at 71.

19. Record, Vol. 5 at 129.

20. Record, Vol. 5 at 71.

21. Record, Vol. 5 at 102-03 (testimony of Buck), 145 (testimony of Korenchuk).

official preparing it was to check if the specified problem was among the reasons for the action. If a reason at issue did not fall under one of the listed categories, there was a separate box marked "other" that could be checked, and yet another box into which the official could write any reason. (JA 74a). Below the boxes was the instruction "**Explain in detail** item or items checked. Please give date and time of specific incident." (*Id.*)(emphasis in original).

When completing this form in April 2004, Buck had checked only boxes that were relevant to Staub's asserted failure to report in under Mulally's newly imposed rule. And in Buck's "expl[anation] in detail" of those checks, she referred only to Staub's asserted complete failure to obey the directive to report in when leaving his post.

The District Court Proceedings

At trial, there was sharply conflicting testimony about many of the relevant facts, including the alleged anti-military remarks of Mulally and Korenchuk, and the events of January and of April 20.[22] Proctor "dispute[d] the vast majority of the facts" adduced by Staub. (JA 112a). "[T]he testimony and documentation about who said what to whom was hotly contested." (JA 57a). "There remain[ed] a question of fact about the degree of Mulally's influence." (JA 87a). The magistrate judge

22. In denying Proctor's motion for summary judgment, the magistrate judge noted that "[t]he evidence presented by the two sides indicates important factual inconsistencies which must be clarified before a jury." (JA 110a).

who presided over the case observed that "given the testimony about . . . Korenchuk's role . . . it was not inherently unreasonable or improper for the jury to have disbelieved crucial parts of the testimony offered by . . . Buck and . . . Korenchuk." (JA 58a). "The extent to which the decision to terminate's Staub's employment was colored by the negative attitudes of Mulally and Staub's co-workers was . . . a question of fact." (JA 81a).

After those wide ranging factual disputes were fully aired at trial, the jury returned a verdict in favor of Staub. (JA 41a, 55a). The jury, in response to jury interrogatories, concluded that Staub had proved that his military status "was a motivating factor in the decision to discharge him," and that Proctor had failed to show that Staub "would have been discharged regardless of his military status."[23]

23. The jury returned the following verdict:

> 1. Has Plaintiff proved by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the decision to discharge him?
>
> Yes.
>
> 2. Has the Defendant proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status?
>
> No.
>
> 3. Under the law given you in these instructions, did the Defendant act willfully in violation of USERRA in discharging Plaintiff?
>
> No.

(JA 25a 26a, 66a 68a).

The Court of Appeals Proceedings

The court of appeals reversed. It held that it was legally irrelevant whether Korenchuk or Mulally had caused Staub's dismissal, because neither of those biased officials had a "singular influence" over Buck, such that Buck was a mere "cat's paw" of Korenchuk or Mulally. (JA 50a). The court of appeals acknowledged that the actions of Korenchuk and Mulally had played a role in Buck's decision. "Without the January 27 write-up . . . and the event on April 20 . . . Buck said she would not have fired Staub." (JA 39a; see *id.* ("Buck's testimony made clear that . . . she relied on Korenchuk's input")). (JA 39a-40a). But the Seventh Circuit held that was insufficient as a matter of law because the defendant had immunized itself from liability by adducing testimony by Buck that she had relied in part on a source of information other than the assertedly biased employees. (JA 50a-51a).

The court of appeals held that it was improper to admit any of the evidence that Mulally or Korenchuk harbored animus toward Staub because of his military service. Because, under the Seventh Circuit's legal standard the employer was responsible only for Buck's motives, and because Staub had never claimed that Buck herself shared the anti-military animus of the others, the court of appeals overturned the jury verdict, and directed entry of judgment for the defendant. (JA 51a).

Staub filed a timely petition for rehearing en banc. The petition was denied on April 28, 2009. (JA 53a).

SUMMARY OF ARGUMENT

I. When Congress enacts legislation imposing liability on employers for prohibited conduct, it is presumed to have intended that a defendant's liability for the actions of its officials will be governed by traditional agency principles. The terms of USERRA are consistent with agency law, providing that the definition of an employer includes any person "to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. § 4304(a)(i).

"It is well established that traditional vicarious liability rules make principals or employers vicariously liable for the acts of their agents or employees in the scope of their authority." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). An official acts as an agent of the employer when the official is performing the kind of work assigned by the employer or is aided in his or her action by his position. *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 759-60 (1998).

Personnel decisions at most employers are frequently the result of a chain of decisionmaking, in which a series of officials, each playing distinct roles, make separate decisions and take different actions. So long as a biased official in so doing acts as an agent of the employer, the employer is liable for injuries caused by the official's conduct. It makes no difference whether or not the discriminatory official is the last or "ultimate" decisionmaker.

The biased officials in this case, Korenchuk and Mulally, clearly were acting as agents of Proctor Hospital. As Staub's supervisors, Korenchuk and Mulally were engaging in traditional employment related responsibilities of supervisors when either reported on Staub's actions,

provided information about him to Human Resources officials, participated in discussions about Staub's status, and issued a disciplinary "Corrective Action" to Staub.

II. The Seventh Circuit erred in failing to consider whether Korenchuk and Mulally were agents of Proctor, and instead applied that circuit's "cat's paw" or "singular influence" standard.

The Seventh Circuit cat's paw standard is a severe departure from settled agency principles. Under that standard an employer is ordinarily absolved from liability for injuries caused by its officials so long as the last official in the decisionmaking chain—the ultimate decisionmaker—had no unlawful purpose. Traditional agency principles contain no such restriction. An investment bank is liable if its CFO knowingly places materially inaccurate information in a prospectus used to sell financial products, regardless of whether the CEO who finally approved the prospectus—the ultimate decisionmaker—was unaware of those misrepresentations and has no personal intent to defraud investors.

The courts will ordinarily apply traditional agency principles unless Congress has expressly directed that they not do so. See *Domino's Pizza, Inc. v. Mcdonald*, 546 U.S. 470, 477 (2006)(declining to "make[] light of" or "ignor[e]" agency law without congressional direction). USERRA contains no such direction. To the contrary, USERRA imposes liability where an unlawful discriminatory purpose was "a motivating factor in the employer's action." 38 U.S.C. § 4311(c)(1). The statute is not limited to instances in which such a discriminatory purpose was a consideration in the mind of the ultimate decisionmaker, or of a person with "singular influence" over the ultimate decisionmaker.

The court of appeals reasoned that in the absence of "singular influence" it would be improper to "impute[] to" Buck the motives of Korenchuk or Mulally. But whether Proctor can be held liable turns on whether under agency law the unlawful animus of Korenchuk or Mulally is imputed to the employer (Proctor), not to another official (Buck). Proctor, not Buck, is the defendant in this action.

The "singular influence" standard would encourage employers to evade the commands of USERRA simply by assigning final decisions to human resources officials with little personal knowledge of the relevant facts. Under the decision below, an employer is not liable so long as the human resources official who made the final decision merely considered some information from an unbiased source, even though the official ultimately decided to dismiss a plaintiff based on inaccurate reports, information or recommendations from a biased official.

There is no reason to assume that Congress intended to hobble the enforcement of USERRA in this manner. Nothing in USERRA indicates that Congress desired such a uniquely stingy standard to apply to a law designed to ensure that those who willingly put their lives on the line to defend the Nation would not also have to sacrifice their economic livelihoods. To the contrary, this Court has long held that USERRA is "to be liberally construed for the benefit of the returning veteran." *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980).

The express purpose of USERRA is to "minimiz[e] the disadvantages to civilian careers and employment which can result from [military] service." 38 U.S.C.

§ 4301(a)(1). That purpose is clearly frustrated by an interpretation of USERRA that denies relief whenever biased supervisors impose those very disadvantages by laundering their unlawful purposes through a guileless human resources official.

III. The jury in this case concluded that Staub's military service was a motivating factor in his dismissal. It further held that Proctor had failed to demonstrate that it would have dismissed Staub in the absence of his military service. There was ample evidence to support both of these determinations. This allocation of the burdens of proof was dictated by the terms of the statute. 38 U.S.C. § 4311(c)(1).

Even though Proctor was unable to show it would have fired Staub regardless of his military status, the court below held that "the employer is off the hook if the decisionmaker did her own investigation." (JA 47a).

This judicially fashioned "own investigation" defense has no basis in agency law. So long as Korenchuk or Mulally acted as Proctor's agent, and Proctor cannot show it would have dismissed Staub regardless of their actions, it is irrelevant under agency law whether Buck herself made some separate inquiry.

The Seventh Circuit's "own investigation" defense is inconsistent with the terms of USERRA. Section 4311(c)(1) provides that once a plaintiff has shown that his or her military service was a motivating factor, "[a]n employer *shall* be considered to have engaged in [prohibited] actions . . . unless the employer can prove that the action would have been taken in the absence of

such . . . service." (Emphasis added). The courts have no authority to create an additional defense that precludes imposition of liability under the very circumstance in which section 4311(c)(1) expressly imposes it.

ARGUMENT

This case is controlled by long-established principles of agency law. The question presented is whether Proctor Hospital is legally responsible for injuries to Staub caused by discriminatory actions taken by two supervisory officials, Korenchuk and Mulally. Settled agency law imposes liability on an employer for harms caused by those who act as its agents. Korenchuk and Mulally clearly acted as agents of Proctor Hospital when they engaged in the conduct that led to, and was intended to bring about, Staub's dismissal.

I. AN EMPLOYER IS LEGALLY RESPONSIBLE FOR THE ACTIONS OF EMPLOYEES WHO ACT AS AGENTS OF THE EMPLOYER

(1) USERRA forbids an employer from discriminating against an employee because of his or her military service. Like most federal laws, USERRA does not identify the officials and workers for whose discriminatory actions an employer is liable. Accordingly, in the absence of a contrary congressional direction, this Court applies traditional agency principles.

"[T]he Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability

rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). For that reason, the Court has consistently relied on agency principles to decide who is an employee[24], to determine who is an agent for whose actions an employer is liable[25], and to resolve a number of other issues.[26]

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24. *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445, 448, 449 (2003)(who is an employee under the Americans with Disabilities Act); *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995)(who is an employee under the National Labor Relations Act); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 25 (1992)(who is an employee under ERISA); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)(who is an employee under Copyright Act); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-23 (1974)(who is an employee under the Federal Employers' Liability Act); *Logue v. United States*, 412 U.S. 521, 527-28 (1973)(who is an employee of the United States under the Federal Tort Claims Act); *Baker v. Texas & Pacific R.Co.*, 359 U.S. 227, 228 (1959)(*per curiam*)(whether individual was an employee of the employer in question); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).

25. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 144 (2004); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 801 (1998); *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 392 (1982); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565 68 (1982).

26. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006)(relying on agency law to determine whether shareholder has claim based on violation of rights of corporation); *Meyer v. Holley*, 537 U.S. 280, 285 86 (2003)(shareholder liability for claims against corporation); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 94 (1994)(ratification).

USERRA's definition of an employer confirms that traditional agency law is the proper reference point. USERRA defines "employer" to include "a person . . . to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. § 4304(a)(i). "Delegation" is a term commonly used in agency law to identify the employees for whose actions a principal is legally responsible.[27] See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)(use of agency related language indicates intent that agency principles apply).

"It is well established that traditional vicarious liability rules make principals or employers vicariously liable for the acts of their agents or employees in the scope of their authority." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Agency law imposes on a principal liability for the actions of its agents because the principal, having retained those agents to conduct its business and standing to profit from their activities, can in return fairly be held responsible for the injuries inflicted by those agents in the course of those activities.[28]

27. E.g, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759 60 (1998)("[w]hen a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule . . . appears to be the appropriate form of analysis"); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70 (1986)("[W]here a supervisor exercises the authority actually delegated to him by his employer, by making decisions . . . affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to make them")(emphasis added).

28. W. Seavey, Handbook of the Law of Agency, 141 (1964); 5 F. Harper, F. James & O. Gray, Law of Torts, § 26.5, p. 17 (2d ed., 1956); D. Dobbs, The Law of Torts, 908 (2000).

That principle applies to "both negligent and intentional torts committed by an employee within the scope of his or her employment," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998), as well as in criminal cases. *New York Cent. & H.R.R. Co. v. United States*, 212 U.S 481, 493-95 (1909). It is a rule of strict liability for the actions of an agent, and applies regardless of whether the employer authorized or knew about the acts of the agent. *Railroad Co. v. Hanning*, 82 U.S. (15 Wall.) 649, 657 (1873). This Court has repeatedly recognized that such agency principles apply to federal anti-discrimination laws, which USERRA parallels. *Ellerth*, 524 U.S. at 759-60; *Faragher v. City of Boca Raton*, 524 U.S. 775, 784 (1998); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392 (1982).

Under respondeat superior an employer can be held liable in several distinct, but often overlapping, circumstances. First, an employer is liable when an official was "aided in" his misconduct by his position. *Burlington Industries Inc. v. Ellerth*, 524 U.S. at 759-60; *Faragher*, 524 U.S. at 784; see Restatement (Second) of Agency, § 219(2)(d). Thus liability is imposed when an employee "exercises the authority actually delegated to him by his employer." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70 (1986); *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494 (1909)(employees act within the scope of their employment whenever they are "exercising the authority delegated to [them]"). Second, a worker's conduct is within the scope of her employment if she is "performing work assigned by the employer." Restatement (Third) of Agency, § 7.07 (2005); see *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.

1990)(employer liable when employee does "the kind of thing that [official] is authorized to do")(citing Restatement (Second) of Agency § 228 (1958)).[29]

(2) The application of these principles is straightforward when a disputed employment action, such as a dismissal, was solely the result of a single decision. But except for the smallest employers, employment actions are usually the result of a number of discrete decisions involving two or more different officials, each authorized to play a distinct role. The principles of agency law provide the standard for determining when an employer is legally responsible for the actions of those various officials.[30]

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29. 2 F. Harper, F. James and O. Gray, The Law of Torts 24 (2d ed. 1956)(employer liable when "the servant is engaged in performing what he is hired to do").

30. [T]he allegedly biased subordinate accomplishes his discriminatory goals by misusing the authority granted to him by the employer—for example, the authority to monitor performance, report disciplinary infractions, and recommend employment actions.

EEOC v. BCI Coca-Cola Bottling Co., 450 F. 3d 476, 485 (10th Cir. 2006); *id.* at 485 ("subordinate bias theories comport with . . . basic agency principles"), 487("causation standard comports with the agency principles that animate the statutory definition of an 'employer.' *See* Restatement § 219 (describing the scope of a master's liability 'for the torts of his servants' and thereby incorporating standard tort concepts like causation)"); *Kramer v. Logan County School Dist. No. R-1*, 157 F. 3d 620, 624 (8th Cir. 1998)("[t]his Court has previously recognized this application of agency principles"); *Long v. Eastfield College*, 88 F. 3d 300,

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This Court has repeatedly recognized that employers, rather than leaving important decisions (particularly dismissals) to the exercise of ad hoc discretion by a single supervisor or manager, frequently utilize instead some sort of "decisionmaking process." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 137, 141 (2000)(plaintiff dismissed by company president based on recommendations of and information from three supervisors); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236, 248 (1989)(partnership denied by Policy Board after comments by numerous partners and recommendation by Admissions Committee); see *Delaware State College v. Ricks*, 449 U.S. 250, 252 (1980)(tenure denied by Board of Trustees based on recommendation of tenure committee and Faculty Senate).

"Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings to a more senior manager who may work in a different city or state." (Brief *Amicus Curiae* of the Equal Employment Advisory Council, *BCI Coca Cola Bottling, Co. v. EEOC*, No. 06-341, at 14). "[M]any companies separate the decision-making function from the investigation and reporting functions . . . . [B]ias can taint any of those functions." *EEOC v. BCI Coca-Cola*

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307 (5th Cir. 1996)(allegedly biased officials "as supervisors in their respective departments, had the authority to make recommendations concerning the employment status of their subordinate employees"); *Karibian v. Columbia University*, 14 F. 3d 773, 777 (2d Cir. 1994)(employer liable where supervisor "wields the employer's authority"), cert. denied, 512 U.S. 1213 (1994).

Bottling Co., 450 F. 3d 476, 488 (10th Cir. 2006); see *id.* 491 (supervisor explained "I gather the facts and I present them to our HR department, and they decide whether it is an insubordination or not and whether there's action to be taken or not").

A single disputed employment action will often be the result of a chain of decisionmaking involving several officials each playing a distinct role within the scope of his or her employment.[31] Most disciplinary decisions will result from, and be caused by, a series of such decisions, including

— the decision to report an employee

— the decision to investigate an employee

— the decision to initiate a disciplinary process

31. *Kant v. Seton Hall University*, 279 Fed. Appx. 152, 155-56 (3d Cir. 2008)(recommendation by School Rank and Tenure committee made to University Rank and Tenure Committee which made recommendation to University Provost); *Back v. Hastings On Hudson Union Free School Dist.*, 365 F. 3d 107 (2d Cir. 2004)(school principal and Director of Pupil Personnel Services made recommendation to School Superintendent who made recommendation to Board of Education); *Ostrowski v. Atlantic Mutual Ins. Co.*, 968 F. 2d 171 (2d Cir. 1992) (recommendation of Senior Vice President to Vice President for Human Resources, who made recommendation to President); *Roebuck v. Drexel University*, 852 F. 2d 715, 723-24, 727 (3d Cir. 1988)(five lawyers of decisionmaking; "at each stage of the process the evaluator . . . considered the reports and recommendations of each previous evaluator")

— the decision to establish the procedures to be followed or standard to be applied

— the decision as to what information will form the record on which action will be taken

— the determination from that record as to what events occurred

— the decision to provide any recommendation

— the decision as to whether particular events violated some applicable rule

— the decision as to what sanction should be imposed for a particular violation

Any disciplinary action will require that several if not most of these distinct decisions be made by *some* official acting as an agent of the employer. All of these decisions and the conduct which they involve fall squarely into the sort of "employment-related responsibilities" that an employer's agent would have. Practical experience in the lower courts makes clear that agents playing any of these roles can use their position to bring about the dismissal of, or other employment actions adverse to, a targeted individual.[32]

An employer, of course, is free to allocate responsibility for these decisions among as few or as many officials as it pleases. But the manner in which an

32. We set forth in the Appendix to the brief cases illustrating the ways in which this has occurred.

employer does so will not reduce its legal liabilities. So long as the official who takes any particular action does so as an agent of the employer, the employer is liable if that official acts for an unlawful purpose and causes injury to a protected employee.[33]

(3) In the instant case the court below attached particular controlling importance to the last official who took part in the chain of decisionmaking, Vice President Buck. The role of Buck was essentially to select the sanction to be imposed in light of the violation reported (inaccurately) by Korenchuk of the stringent reporting requirement established for Staub by Mulally. But nothing in agency law contemplates that only the last of a series of decisionmakers can be an agent, or attaches greater significance to the act of one agent (e.g., determining the level of sanction) than to the act of another (e.g., reporting alleged misconduct).

So long as the official whose actions led to injury was an agent, it is unimportant whether that official was the first or last in the series of decisionmakers involved. "[W]here a supervisor exercises the authority actually

33. An employer would not be responsible if someone other than an agent of an employer took a discriminatory action that in turn caused the employer to take an adverse action against a plaintiff, so long as no official knew or had reason to know of that discriminatory motive. For example, an employer is not ordinarily responsible for the motives of a former employer who (for an unlawful reason) may have given a job applicant an adverse recommendation, or for the biases of a patient who may have falsely complained about a health care worker because the patient objected to the worker's race or national origin.

delegated to him by his employer, by making decisions . . . *affecting* the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to make them." *Meritor*, 477 U.S. at 70 (emphasis added). In both *Ellerth* and *Faragher* this Court expressly acknowledged and applied the "agency principle[] of vicarious liability for harm *caused by* misuse of supervisory authority." *Ellerth*, 524 U.S. at 764 (emphasis added); *Faragher*, 524 U.S. at 577 (emphasis added); see *Meritor*, 477 U.S. at 70 (employer liable for use of delegated authority "*affecting* the employment status" of a worker)(emphasis added). *Reeves* reiterated that a discrimination plaintiff can prevail by demonstrating that an impermissible consideration "actually played a role in [the employer's decisionmaking] process and had a determinative *influence* on the outcome." 530 U.S. at 141 (*quoting Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)(bracketed material in *Reeves*)(emphasis added). The same agency principles apply here.

Consistent with agency law, USERRA provides that the burden on a plaintiff is to establish that military service was "a motivating factor in the employer's action." 38 U.S.C. § 4311(c). USERRA does not require proof that the impermissible factor have been "a motivating factor" in the action of any particular official, but necessitates only a showing that an impermissible consideration was "a motivating factor" in "the *employer's* action." (Emphasis added). So long as the biased official acted as an agent of the employer—and thus *was* the employer for agency liability purposes—the statutory requirement is satisfied.

(4) Determining whether personnel related tasks are within the responsibilities of a particular official will ordinarily be for the trier of fact. The allocations of such responsibilities commonly are not in writing, and case-specific allocations almost never will be. Although some decisionmaking processes (like a tenure decision) may be highly structured and well established, employers frequently and sensibly distribute responsibility for particular aspects of a decisionmaking process in a highly informal and/or ad hoc manner. The distribution of responsibilities often will simply be a matter of practice. The task of the trier of fact in determining who played what role in a decision may often be complicated by the fact that all the participants are employees of the defendant; although the trier of fact may choose to credit the testimony of such interested witnesses, it need not do so. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000). "It should go without saying that a company's organizational chart does not always accurately reflect its decisionmaking process." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d at 486.[34]

In the instant case there was ample evidence that Korenchuk was acting as an agent of Proctor—engaging in "employment-related responsibilities"—in his role in the April 20 dismissal. First, it was Korenchuk who initiated the disciplinary process by reporting to Buck (albeit inaccurately) regarding serious misconduct by Staub. Reporting misconduct to Human Resources is ordinarily a core function of line supervisors such as

34. *See Wells v. New Cherokee Corp.*, 58 F. 3d 233, 238 (6th Cir. 1995)(courts look to actual responsibilities, "whatever the formal hierarchy").

Korenchuk. Second, Korenchuk acted for the employer in determining what information would provide the record before Buck. It was Korenchuk who informed Buck that Staub had never reported in as directed in the January 27 Corrective Action, and who withheld from Buck the fact that Staub had reported in by voicemail on April 20. Korenchuk was precisely the person whom Proctor would have expected to play this role, since it was to Korenchuk (and Mulally) that Staub was to report whenever he left his work station. Providing such information to Human Resources officials is a traditional responsibility of supervisory officials; Proctor does not suggest that this task fell outside of Korenchuk's area of responsibilities. Third, because Buck simply accepted Korenchuk's account of the events in question, Korenchuk was, as a practical matter, accorded the power to determine what facts had occurred. Fourth, Korenchuk participated directly in a discussion with Buck about how Staub should be dealt with, a role that was accorded him as Staub's supervisor.[35]

Mulally was clearly acting in her supervisory capacity in connection with the January 27 Corrective Action.[36] The Corrective Action which she prepared set out inaccurate information provided by Mulally as Staub's supervisor.[37] It was Mulally who personally

35. Record, Vol. 5 at 129 ("I went down and met with human resources and *we* discussed this and *we* discussed Vince's prior activities")(emphasis added), 145 ("*we* discussed Vince and the problems . . . /*W/e* went over this and *we* went over some other problems")(emphasis added)(Korenchuk testimony).

36. Record, Vol. 5 at 168, 170.

37. Record, Vol. 5 at 120.

wrote the Corrective Action, and in signing it Mulally was assuredly acting as an agent of Proctor.[38]

II. THE SEVENTH CIRCUIT'S "SINGULAR INFLUENCE" AND "CAT'S PAW" STANDARDS ARE INCONSISTENT WITH AGENCY LAW AND USERRA

(1) In holding that Proctor Hospital was not legally responsible for the discriminatory conduct of Korenchuk and Mulally, the court of appeals did not purport to apply either agency law or the terms of USERRA. It relied, rather, on "the cat's paw theory," based on a seventeenth century fable by the French poet Jean de La Fontaine entitled "The Monkey and the Cat."[39] To ascertain the

38. Record, Vol. 5 at 146.

39. This fable was created in the seventh century B.C. by the Greek writer Aesop, and put into verse by the seventeenth century French poet La Fontaine. In the fable, a monkey and a cat observe chestnuts roasting on a fire in the home of their owner. The monkey persuades the cat to pull the chestnuts from the fire, promising to share the chestnuts and flattering the cat with compliments about his feline dexterity. The cat is persuaded by the monkey, and pulls chestnuts from the fire, singeing his paw in the process. Unfortunately for the cat, he had misjudged the motives of the monkey. While the cat is taking the chestnuts from the fire, the monkey eats them all.

Supervisors do not persuade personnel officials to dismiss workers by promising to share some sort of bonus that the supervisor will receive as a result of the dismissal; employers do not provide financial rewards for adverse employment actions. There appear to be no reported cases in which a supervisor used flattery of a personnel or other official to induct him or her to take an employment action.

controlling legal standard, the Seventh Circuit reasoned, "we turn to the applicability of La Fontaine's 'cat's paw' to 21st century federal anti-discrimination law." (JA 43a). An employer is only responsible for the motives of the ultimate decisionmaker, the Seventh Circuit held, if that decisionmaker was under the "singular influence" of someone else. "To be a cat's paw requires . . . blind reliance, the stuff of 'singular influence.'" (JA 51a). The court of appeals' "singular influence" requirement was imposed "to prevent the cat's paw theory from spiraling out of control." (JA 44a). "If the decisionmaker wasn't used as a cat's paw—if she didn't just take the monkey's word for it, as it were—then of course the theory is not in play." (JA 45a).

Such vivid metaphors[40], whatever their literary provenance, are not part of the corpus of the common law of agency which Congress is presumed to have intended would govern employer liability under USERRA. Whether an official such as Korenchuk or

40. *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007)("the Fourth Circuit seems to take the cat's paw metaphor too literally": "[t]he metaphor is not a causation rule"); *EEOC v. BCI Coca Cola Bottling Co.*, 450 F.3d at 488

> subordinate bias cases have suffered from an abundance of vivid metaphors. The Fourth Circuit, for example, seems to have taken the 'cat's paw' metaphor too literally in deriving its total-control-over the actual decision standard. . . . We see no reason to limit subordinate bias liability to situations that closely resemble the 'cat's paw,' 'rubber stamp,' 'conduit,' 'vehicle,' or other metaphors that imaginative lawyers and judges have developed to describe such claims.

Mulally was an agent for Proctor Hospital depends on the nature of their relationship with and responsibilities for their employer, whether they were carrying out their employment-related responsibilities and whether they were using or aided by their authority. What occurred *after* Korenchuk and Mulally acted—how much sway they had over Buck—does not alter after the fact their status as agents.

The Seventh Circuit did not pretend that its "singular influence" requirement has any basis in the common law of agency. Nor did the court of appeals propose that this rule should be applied to any claims except those arising under "federal anti-discrimination law[s]." If the singular influence standard were adopted by this Court as a *general* rule of agency law, the ramifications for corporate compliance with federal and state laws would be monumental. The United States Code is replete with provisions whose applicability (like the USERRA anti-discrimination prohibition) turns on the existence of a particular intent or purpose. There are literally thousands of federal statutes that forbid or regulate conduct taken "because of," "on account of," "on the basis of," or "based on" some prohibited consideration. Fundamental rules of contract and tort turn as well on a defendant's intent. Insofar as these laws apply to corporations, government bodies, or other entities of any size, their effectiveness and even viability would be substantially impaired if the only intent that mattered was the motive of the official who made the last decision in a decisionmaking chain, and the rare individual who exercised "singular influence" over that official.

If, for example, supervisors at a government contractor prepared lavishly exaggerated statements of expenses and wrote up charges for costly but non-existent services, the False Claims Act might not be violated if the accountant who finalized and submitted the bill to the United States did not know what was going on. If Proctor Hospital sold bonds to the public based on an inaccurate prospectus, bond buyers could not demonstrate fraud in the inducement—and get their money back—if the CEO who approved the prospectus had been lied to by Korenchuk (or by the CFO) about the firm's profitability. An investment bank might avoid liability for inaccurate marketing materials if only the trader who drafted those materials, but not the CEO who approved them, was aware of the inaccuracies. A wide range of statutes that govern relations between and the rights of corporations themselves—copyright, patent, securities, anti-trust, trade and other laws—would be affected in unpredictable if not bizarre ways if subject to the Seventh Circuit "singular influence" rule.

The "cat's paw" is assuredly not the usual standard of liability applied to laws other than anti-discrimination statutes. Nothing in USERRA indicates that Congress desired a uniquely stingy conception of agency responsibility to hobble a law designed both to protect the ability of the United States to defend itself through the training and deployment of military reservists, and to ensure that those who willingly put their lives on the line to defend the Nation do not also have to sacrifice their economic livelihoods. Nothing in the Seventh Circuit's decision explains why Congress would have wanted to build into USERRA such an exceptional limitation on the deterrence and correction of unlawful

discrimination against the men and women who serve in the Nation's military reserves.

Beyond that, the principle that corporations are responsible for the knowledge and motives of subsidiary officials, even if those motives are not communicated to ultimate decisionmakers, is a rule that in countless ways protects Proctor Hospital itself. See *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006). When a vendor sells Proctor medical equipment or supplies, Proctor knows it can rely on representations regarding the origin, capacity and content of those materials because the vendor will be liable if any of its officials (not merely some ultimate decisionmaker) were aware that those representations were inaccurate. If medical vendors could hide behind the good faith ignorance of the ultimate decisionmaker who approved such representations, both Proctor and its patients would be in serious jeopardy.

(2) This Court will depart from traditional agency principles only where Congress has expressly so directed. "[T]he courts ordinarily should determine that matter in accordance with traditional principles of vicarious liability—unless . . . Congress . . . has instructed the courts differently." *Meyer v. Holley*, 537 U.S. 280, 290-91 (2003). "Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles, cannot show that it intended to apply an unusual modification of those rules." 537 U.S. at 286 (Emphasis in original). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." 537 U.S. at 285 (*quoting United States v.*

Texas, 507 U.S. 529, 534 (1993)); see *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006)(declining to "make[] light of" or "ignor[e]" agency law).

The Seventh Circuit's analysis rests on that court's insistence that in this case it was Buck who was the one and only "decisionmaker" for purposes of USERRA. A plaintiff "must show that the *decisionmaker* harbored animus and relied on that animus in choosing to take action. . . . Buck was the decisionmaker." (JA 41a) (emphasis in original). But the word "decisionmaker," and the phrase "*the* decisionmaker," appear nowhere in USERRA. Instead, the statute imposes liability for discrimination on employers and on those to whom—like Korenchuk and Mulally—employers have given "employment-related responsibilities."[41] Buck may have been the last person in the decisionmaking chain, and in that narrow sense may have made "the ultimate decision" (JA 40a), but she assuredly was not the only decisionmaker in the chain of events that led to Staub's dismissal. Buck decided what sanction should be imposed for the misconduct at issue; but it was Korenchuk who effectively decided (albeit inaccurately) what misconduct Staub had engaged in, since

41. The regulations issued by the Secretary of Labor contain an exemption from the statutory definition of an employer. It excludes from the "employment-related responsibilities" that define an employer "functions that are purely ministerial in nature, such as maintenance of personnel files or the preparation of forms for submission to a government agency." 20 C.F.R. § 1002.5(2)(1)(i). The existence of that regulation indicates that non-ministerial actions that cause unlawful discrimination do fall within the statutory definition of employer.

Korenchuk's account of Staub's asserted failure to report in (whether on April 20 or for months before) was simply accepted by Buck. A jury could find that it was Mulally who effectively imposed the earlier January 27 Corrective Action which Buck believed had been violated. Buck was not, as the court below described her, "*the* decisionmaker" (emphasis added); she was simply one of several decisionmakers.

The court of appeals explained that "the cat's paw theory . . . is a way of proving discrimination when the decisionmaker herself is admittedly unbiased; under the theory, the discriminatory animus of a nondecisionmaker is *imputed to the decisionmaker* where the former has singular influence over the latter and uses that influence to cause the adverse action." (JA 31a-32a)(emphasis added). But whether Proctor can be held liable turns on whether "discriminatory animus . . . is imputed" to the employer (Proctor), not on whether it is imputed to the decisionmaker (Buck). Proctor, not Buck, is the defendant in this action. Whether the discriminatory motive of Korenchuk and Mulally can be imputed to their employer turns on whether those officials acted as agents of the employer, not on the nature of their relationship with or influence over any particular official. *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392 (1982).

The court of appeals also reasoned that "[d]ecisionmakers usually have to rely on others' opinions to some extent because they are removed from the underlying situation. But to be a cat's paw requires more." (JA 51a). But this is not an action against the "decisionmaker" (Buck), but against the corporation

that employed Buck, Korenchuk and Mulally. Proctor Hospital did not "have to" place the ultimate decision to fire Staub in the hands of someone "removed from the underlying situation." The hospital could, for example, have chosen to give that authority solely to Korenchuk. Proctor was not entitled, by giving to one official responsibility for reporting "the underlying situation" and to another official the responsibility for making the "ultimate decision," to escape legal liability for the discriminatory actions of the former.

(3) There is no plausible reason why a Congress that was motivated to protect military reservists from being discriminated against by the very people they risk their lives to defend would have adopted the severe limitation on agency principles that is contained in the Seventh Circuit cat's paw and singular influence standards.

First, given the realities of human resources practices, Congress had no logical reason to attach controlling importance to the actions of the ultimate decisionmaker, while presumptively ignoring all the decisions that may have occurred earlier in the process. Often the only or primary thing determined by the last of the decisionmakers in the disciplinary process is the level of discipline to be imposed on the worker involved. But once a decision has been made (often by someone else) regarding the record (accurate or otherwise) on which that decision will be made, the choice of sanction (even if other information is considered) will often be a foregone conclusion. In this case, for example, the contemporaneous "Corrective Action" memorandum signed by Buck indicates that Buck believed

(presumably because she had been told by Korenchuk) that Staub had never obeyed the January 2004 directive. If that were true, any sensible official in Buck's position would have dismissed Staub. Conversely, if Korenchuk on April 20, 2004, had truthfully told Buck only that Staub before going to lunch on that date had reported in by voicemail, Buck surely would not have disciplined Staub at all, although she might have wondered why Korenchuk had wasted her time with such a pointless report.

Second, the cat's paw rule is at war with other established principles of responsibility under federal anti-discrimination laws. Proctor Hospital would clearly have been liable if Korenchuk, out of unlawful animus toward Staub's military service, had given the same false information to another firm where Staub was seeking employment and thus dissuaded it from hiring Staub.[4] If Korenchuk, by discriminating in that manner against Staub, had prevented him from obtaining a job at another hospital (or gotten him fired by another employer), Proctor would have been liable, even though the "ultimate decisionmaker" at the other employer had no unlawful animus. It is difficult to understand why Proctor should be presumptively immune from liability if Korenchuk gives inaccurate information to a Proctor human resources official, but not when Korenchuk gives the same misinformation to another company's human resources official.

42. *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988); *Smith v. Secretary of Navy*, 659 F.2d 1113, 1121 (D.C.Cir. 1981); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir. 1977).

Third, the cat's paw rule in some circumstances immunizes discrimination by ensuring that certain discrimination claims will be either premature or too late to vindicate. That is because not every discriminatory action violates federal anti-discrimination statutes. If a discriminatory act by itself has not yet caused any significant harm, it may be not be sufficiently adverse to be actionable.[43] In such situations the lower courts have held that the employer has not (yet) broken the law, and the employee cannot obtain redress until and unless that discriminatory act actually causes some injury. If, for example, Staub had attempted to challenge the January 2004 write up, the lower courts might have dismissed that action as premature. But under the Seventh Circuit's "singular influence" rule, when that January 2004 disciplinary order (presumably just as Mulally intended) actually resulted in Staub's dismissal, and the requisite injury occurred, the employer was no longer legally responsible for the consequences of that earlier discriminatory action.

Fourth, the Seventh Circuit's singular influence rule attaches controlling importance to circumstances that frequently will be exceptionally difficult to assess. While it often may not be a difficult task to determine whether a biased official *caused* a dismissal, it usually will be far harder to determine whether that official had a "singular influence" over another decisionmaker. For example, in this case causation is fairly clear, since Staub

43. 1 B. Lindemann and P. Grossman, Employment Discrimination Law, 21 (4th ed. 2007). There is considerable disagreement among the lower courts regarding when an employment action is sufficiently adverse to be actionable. This case does not required the Court to address that issue.

would not have been dismissed on April 20 but for Mulally's January 27 write up and Korenchuk's April 20 report. But under the singular influence standard Proctor's liability would turn on whether, after Buck received Korenchuk's report, she considered anything else she knew (from prior meetings, or having seen Staub's file) before making her decision. There usually will be no reliable contemporaneous record of what passed through the mind of the ultimate decisionmaker. Conversations among company officials will usually have been overheard only by officials with an interest in the outcome of the case. Under this liability standard defense witnesses would have a considerable incentive to recollect their mental processes or conversations in a way that minimized the role of the biased official. In the instant case, as in others[44], there is significant

44. In *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F. 3d 46 (1st Cir. 2000), the court of appeals commented that "[t]he events leading up to th[e] decision are not entirely clear," noting that three company officials gave conflicting accounts of who made the decision and what conversations had preceded it, and that there was evidence the supposedly contemporaneous memorandum explaining the decision "was only written after [the plaintiff] initiated legal proceedings." 217 F. 3d at 52.

In *Gee v. Principi*, 289 F. 3d 342 (5th Cir. 2002), the final decisionmaker initially denied he had participated in a meeting about the plaintiff, and only later admitted that he had. "Asked why he did not disclose this fact [earlier], he responded that he did not know." 289 F. 3d at 347. The final decisionmaker originally claimed that "others were not involved in the [decisionmaking] process, [but] later admitted that he had conferred with several people." *Id.*

> [A]lthough [the final decisionmaker] at first was unable to recall the substance of the statements

(Cont'd)

evidence that the employer's account changed once it realized that the ultimate decisionmaker had relied on information from a biased official. A jury, of course, would not be obligated to accept such accounts. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151

(Cont'd)

> made about [the plaintiff] at the meeting, he later testified that everyone made comments and the general tenor of those comments was unfavorable.

Id. There was a conflict between one witness who recalled that "a consensus against [the plaintiff] was formed at the meeting" and the testimony of the ultimate decisionmaker and the biased officials "who downplayed the significance of the meeting." *Id.*

There was a similar change of explanation in *EEOC v. BCI Coca-Cola Bottling Co.*

> [T]he first explanation provided [for the disputed termination] . . . was "You've been terminated for insubordination, *for not showing up for work.*" . . . The Disciplinary Status Notice unequivocally states that the failure to show up for work . . . *was* the act of insubordination.

450 F. 3d at 490-91 (emphasis in original). In the subsequent litigation

> BCI . . . maintain[ed] that it fired [the worker] solely because of his [alleged] defiant conduct on the phone with [the biased official] . . . and that "[the worker] was not terminated because he did not show up for work . . ." . . . Only later did BCI characterize its decision to fire [the worker] as hinging on his defiant conduct over the phone, rather than on his absence.

450 F. 3d at 491.

(2000). But it seems unlikely that Congress intended to establish a liability standard to protect military reservists that could be so easily manipulated by hostile employers.

The cat's paw rule applied by the Seventh Circuit, moreover, provides an all too simple method by which employers could evade the prohibitions of federal law.[45] Under the "singular influence" standard applied here, an employer is not liable so long as the final decisionmaker relied at least in part on any information that did not come from a biased official. That rule invites employers to largely immunize themselves from liability for violating USERRA or federal anti-discrimination laws merely by requiring human resources officials to go through the motions of reviewing information from

45. If we applied the rule rigidly, employers could simply create a post for the manager in charge of firing employees and isolate that person so that he or she never met the unlucky employees. Supervisors with no official authority to discharge would effectively make firing decisions before informing this manager, who would then act on the decisions, and the employer would not be liable even if the supervisors admitted discrimination. Companies may not so easily insulate themselves from liability for discriminatory discharges. Instead, courts must consider as probative evidence any statements made by those individuals who are in fact meaningfully involved in the decision to terminate an employee.

Wells v. New Cherokee Corp., 58 F. 3d 233, 238 (6th Cir. 1995).

two different sources, which usually would require no more than a quick pro forma glance at a worker's personnel file.[46] A similarly undesirable effect would follow from a rule limiting liability to cases in which a biased supervisor had expressly recommended the action taken against a plaintiff.

> [R]equiring that an explicit recommendation must cross the desk of the decisionmaker, regardless of whether the subordinate's discriminatory actions in fact caused the termination . . . would leave employees unprotected so long as a subordinate stops short of mouthing the words "you should fire him," in person or on paper, to the decisionmaker.

EEOC v. BCI Coca-Cola Bottling Co., 450 F. 3d at 488. The Fourth Circuit's own "ultimate decisionmaker" standard, as a district court judge in that circuit noted, likewise "has the unfortunate potential to create a safe harbor for workplace discrimination by any prejudiced supervisor who can fairly be described as not being the final decisionmaker on personnel decisions."[47] Under

46. Recognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations.

EEOC v. BCI Coca-Cola Bottling Co., 450 F. 3d at 486.

47. Petition for Writ of Certiorari, *Sawicki v. Morgan State University*, No. 06-306, App. 20a (unpublished opinion).

both the Seventh and Fourth Circuit standards, the greater the number of officials among whom an employer divides up its decisionmaking standard, the smaller the likelihood that the employer will be held responsible for adverse employment actions actually caused by its biased officials, and the less protection will be accorded to military reservists from the discrimination that they all too commonly face for having served and protected the Nation.

The loophole created by this rule is particularly serious because when the discriminatory action of one official leads to dismissal at the hands of another, that result often will have been the very purpose of the earlier discriminatory act. *Stoller v. Marsh*, 682 F. 2d 971, 977 (D.C. Cir. 1982)("[w]hen a supervisor, acting in his official capacity, deliberately places an inaccurate, discriminatory evaluation into an employee's file, he intends to cause harm to the employee"); *Hill v. Lockheed Martin Logistics Mgmnt., Inc.*, 354 F. 3d 277, 300 (4th Cir. 2004)(en banc)(Michael, J., dissenting) (biased official "act[ed] on his bias against [the plaintiff] by orchestrating disciplinary actions against her that made her eligible for termination"); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1060 (8th Cir. 1993)(biased official "set [plaintiff] up to fail . . . investigation and . . . committee's review" by statements to other officials); *Jiles v. Ingram*, 944 F. 2d 409, 413 (8th Cir. 1991)(biased supervisor "contrived the . . . incident to get [the plaintiff] transferred out of Station 2 for racial reasons"); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d at 485 (biased supervisor "accomplishes his discriminatory goals").

At best the Seventh and Fourth Circuit cat's paw standards "undermine[] the deterrent effect of subordinate bias claims." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d at 487. Any interpretation that impairs the deterrent effect of USERRA, and reduces an employer's incentive to prevent and correct violations of the law, would confound Congress' purpose "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. § 4301(a)(1). If a member of the armed forces loses his or her civilian job because of the animus of an official such as Korenchuk or Mulally, the "disadvantages to [his] civilian career[] and employment which . . . result[ed] from such service" are the same whether or not that biased official exercised "singular influence" over the final decisionmaker. And the harm to military readiness and morale that results from leaving such discriminatory actions unchecked is not lessened because the last actor in the employer's decisional chain was ignorant of the motives of his or her colleagues. To the deployed soldiers worrying about their jobs and their families' economic livelihood, it is no comfort that overtly biased actors like Mulally and Korenchuk are required to launder their discrimination through a human resources official. USERRA requires *employers*, not merely the last actor in a decisionmaking chain, to refrain from discriminating against reservists. This Court has long held that USERRA (and its predecessor statutes) are "to be liberally construed for the benefit of the returning veteran." *Coffy v. Republic*

Steel Corp., 447 U.S. 191, 196 (1980).[48] The cat's paw standard employed by the court of appeals here stands that rule of construction on its head, leaving military reservists with little hope of legal redress when—because of their military service—they are subject to discrimination at the hands of any official other than the last decisionmaker.

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48. *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977)(*quoting Fishgold*); *Tilton v. Missouri Pacific RR. Co.*, 376 U.S. 169, 181 (1964)(*quoting Fishgold*); *Boone v. Lightner*, 319 U.S. 561, 575 (1943):

> The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations . . . .

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946):

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . . Our problem is to construe the provisions of the Act . . . and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.

When Congress in 1994 enacted USERRA, building on earlier statutes that had provided similar protections to veterans, it expressly endorsed "the basic principle established by the Supreme Court that the Act is to be 'liberally construed.'" H.R.Rep. 103-65, at 19. The House Committee report regarding the definition of employer in section 4304(4) indicated that the definition "is to be broadly construed." H.R.Rep., 103-65, at 21.

III. AN EMPLOYER IS LIABLE FOR DISCRIMINATORY ACTIONS OF ITS AGENTS THAT CAUSE AN ADVERSE EMPLOYMENT ACTION

(1) A plaintiff must show not only that a biased official (such as Korenchuk or Mulally) acted as an agent of the employer, but also that the requisite causal connection existed between the acts of that official and the adverse employment action that injured the plaintiff. The nature of the required showing depends upon the terms of the underlying statute.

If, as is the case under the ADEA, the plaintiff is required to prove that an impermissible consideration was the but-for cause of the adverse employment action, the plaintiff must show that the biased official actually caused the action complained of. See *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009). On the other hand, where a statute like USERRA merely requires a plaintiff to prove that an impermissible consideration was "a motivating factor in the employer's action," a plaintiff need show only that the biased official influenced the ultimate decision; if that showing is made, a defendant can establish a defense by proving that the ultimate decision would have been the same even if the biased official had not taken any unlawfully motivated action. See 38 U.S.C. § 4311(c)(1).

In the instant case the jury concluded that Staub had shown that his military service was "a motivating factor in the decision to discharge him." (JA 66a-68a). The jury also determined that Proctor had failed to demonstrate that Staub "would have been discharged regardless of his military status." (*Id.*).

> In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate. Thus, where an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that [the impermissible factor] *did* make a difference to the outcome.

Price Waterhouse v. Hopkins, 490 U.S. 228, 246 n. 11 (1989)(plurality opinion)(emphasis in original).

There was ample support for the determination of the jury on both of these issues. There was considerable evidence that Korenchuk and Mulally were hostile to Staub, including testimony regarding statements made by both officials objecting to Staub's participation in the Army Reserves. In addition, the jury could have inferred that Korenchuk and Mulally had made false statements to Human Resources officials, withheld important exculpatory information, and took other actions against Staub for the very purpose of bringing about Staub's termination. Given the obvious importance of Korenchuk's April 20 report, and of the January 27 Corrective Action written by Mulally, a jury could easily have concluded that those actions played a role in Buck's decision to dismiss Staub, and that hostility to his military status was thus a "factor" in that decision.

Those same circumstances supported the jury's conclusion that Proctor had failed to show that Staub would have been discharged regardless of his military

status. No defense witness even claimed that Buck would have taken any action regarding Staub on April 20 if Korenchuk had not precipitated the disciplinary process by giving Buck (false) information about Staub's actions. And Korenchuk's report and complaint necessarily rested on the January 27 Corrective Action, written by Mulally, which required Staub to report in to Korenchuk or Mulally whenever he left his work station. Absent Mulally's January 27 Corrective Action, there would have been no rule for Staub to violate by assertedly leaving his work station without reporting in to Korenchuk or Mulally.

(2) The court below held, however, that regardless of whether Proctor had failed to show that it would have fired Staub regardless of his military status, "the employer is off the hook if the decisionmaker did her own investigation." (JA 47a; see JA 44a (if the ultimate decisionmaker "conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker" (*quoting Brewer*, 479 F. 3d at 918)), JA 44a-45a (employer not liable for acting based on information from company official if decisionmaker "conducted her own investigation")). The Seventh Circuit "own investigation" rule provides a complete defense for cases in which, as here, the employer is unable to establish the defense provided by the terms of USERRA because the employer cannot show that it would have taken the action complained of even in the absence of the plaintiff's military status.

Tellingly, the standard for establishing this complete defense based on the ultimate decisionmaker's

unsuccessful "own investigation" is far from demanding. The investigation need not be "robust," and the decisionmaker need not be "a paragon of independence." (JA 51a). In this case, the court apparently concluded that two such self-immunizing "investigations" had occurred, the first when Buck assertedly looked at Staub's personnel file, and the second when Buck spoke briefly with another human resources official about Staub's claim that he had been targeted for dismissal because of his military service. (JA 40a).

The Seventh Circuit's "own investigation" rule is assuredly not part of the common law of agency. If Mulally or Korenchuk acted as Proctor's agent when they provided inaccurate information to Buck, their status as agents of the employer was not altered after the fact by anything Buck herself may have done thereafter. In an ordinary tort case, if one Proctor technician negligently miscalibrated an x-ray machine, the hospital would be liable for any resulting injuries, even if a second technician made a subsequent unsuccessful effort to double check those calibrations. Similarly, if Korenchuk deliberately gave inflated profit data to the hospital CEO, who then put them in a prospectus to sell Proctor Hospital bonds, the company could not avoid liability by showing that the CEO made his own unsuccessful investigation into the accuracy of those figures.

This defense is clearly inconsistent as well with the terms of USERRA. Under section 4311(c), once a plaintiff shows that his or her military service was a motivating factor, "[a]n employer shall be considered to have engaged in actions prohibited . . . under subsection

(a) . . . unless the employer can prove that the action would have been taken in the absence of such . . . service." When, as in the instant case, an employer fails to establish the statutory affirmative defense, section 4311(c) provides without further exception that the employer "*shall* be deemed to have engaged in actions" forbidden by USERRA. (Emphasis added). The courts have no authority to create an additional defense that precludes imposition of liability under the very circumstance in which section 4311(c) expressly imposes it.

The Seventh Circuit "own investigation" rule is based in part on the view that such an investigation is all that should be asked of an employer. *Brewer v. Board of Trustees of U. of Illinois*, 479 F. 3d 908, 920 (7th Cir 2007). But agency law holds an employer responsible for all the torts of its agents, not merely for those torts that could have been prevented if some official had conducted his or her "own investigation." If an employer wishes to eliminate the risk that the biases of officials will influence its decisions, the employer can choose to remain so small that the owner-operator has personal knowledge of all the facts, and never relies on other officials for information or advice. There would be no such influence to misuse if Proctor Hospital were a simple storefront clinic with a single physician, rather than a multi-million dollar enterprise with many hundreds of employees and supervisors and far greater profit potential.

In the case at hand Korenchuk and Mulally, if they were agents of Proctor Hospital, were as much agents of the employer as was Buck. If Buck did all that she

personally could to assure that *her* own actions were not influenced by the unlawful bias of others, that would presumably prevent the imposition of personal liability on Buck herself.[49] But such efforts on the part of one agent do not alter the agency status of other agents, or the principal's responsibility for the harms caused by the actions of those agents.

The Seventh Circuit also reasoned that it would be unduly costly for an employer to do more than have the ultimate decisionmaker conduct her "own investigation." *Brewer*, 479 F.3d at 920. But common law agency principles do not recognize any cost-based exception to liability for the torts of agents.

> [T]he . . . enterprise should pay for the harm caused by the tortious conduct of its members. . . . The expansion of the master's activity by use of the activity of others inevitably leads to wreckage caused by it, and it is proper for [it] to pay for this when tortiously caused in return for the benefits he receives from his servant's proper conduct. . . . [I]t is a rule of strict liability with respect to the master . . . .

Seavey, Handbook of the Law of Agency, 141 (1964).

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49. A number of lower courts have concluded that individual officials who discriminate while carrying out employment-related responsibilities can be personally liable under USERRA. E.g., *Brandasse v. City of Suffolk, Va.*, 72 F. Supp. 2d 608 (E.D.Va. 1999); *Jones v. Wolf Camera, Inc.*, 1997 WL 22678 at *2 (N.D.Tex. 1997).

Nothing in USERRA authorizes any such cost-based exception to the anti-discrimination provisions of section 4311 either. The absolute prohibition in section 4311 contrasts with certain rights under section 4313, which are not available if they "would impose an undue hardship on the employer." 38 U.S.C. § 4312(d)(1)(B); see 38 U.S.C. § 4303(15) (defining "undue hardship"). The Seventh Circuit's creation of a sweeping "independent investigation" exception to section 4311 is contrary to the far more limited case-specific undue hardship exception to section 4313, which requires an employer in each individual case to bear "the burden of proving . . . undue hardship," 38 U.S.C. § 4312(d)(2), and to adduce specific evidence regarding the burden in a particular case with proof of such considerations as "the nature and cost of the action needed" and "the overall financial resources of the employer." 38 U.S.C. § 4304(15).

Under the Seventh Circuit rule a decisionmaker's honest but mistaken conclusion that the plaintiff is not the victim of discrimination by other officials, if based on that decisionmaker's "own investigation," is conclusive.

> [I]t might be too demanding to expect an employer to do more than have an employee conduct a fair-minded, independent investigation into the available evidence and then make a decision in good faith.

Brewer, 479 F. 3d at 920-21. On this rationale a decisionmaker's rejection of a worker's claim of discrimination would operate precisely like res judicata, precluding that worker from later litigating that claim

in federal court. But prior determinations regarding discrimination claims are accorded res judicata effect only when made by federal or state courts, or in some instances by state administrative agencies whose decisions would be accorded res judicata effect in state court. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). There is no claim that under Illinois law a private employer's investigation of the actions of its own officials would be given res judicata effect in state courts.

Under the provisions of Title VII, an employer's rigorous good faith efforts to assure compliance with the law may be a bar to an award of punitive damages. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545 (1999). It would be incongruous if the far less demanding showing of an "own investigation," which does not require the systemic enforcement efforts insisted upon by *Kolstad*, were to result under USERRA (and, presumably, under Title VII itself) in a far more sweeping complete defense to liability than *Kolstad*'s limit on punitive damages.

In determining whether the conduct of another, biased official actually influenced the decision of the ultimate decisionmaker, the trier of fact may of course consider the actions and decisionmaking process of that final decisionmaker. For example, if a biased official provided an inaccurate description of the statement of a key witness, but the decisionmaker chose to disregard that second hand account and personally interviewed the witness, the trier of fact could conclude that the falsified account had no impact on the ultimate decision. But whether an "investigation" or an "independent investigation" prevented a biased official from

influencing the final decision would turn in each case on an assessment of the nature of the conduct of the biased official, the manner in which it could have brought about the action complained of, and the scope of the asserted investigation. An investigation into whether a worker actually engaged in the misconduct asserted by his supervisor would not remove the discriminatory effect of that supervisor's racially selective reporting of such misconduct.[50] "If the ultimate decisionmaker was influenced by others who had retaliatory motives, then his investigation cannot in any real sense be considered *independent*." *Gee v. Principi*, 289 F. 3d 342, 346 n. 2 (emphasis in original); see *Poland v. Chertoff*, 494 F. 3d 1174, 1183 (9th Cir. 2007)(investigation was not "sufficiently independent to break the causal chain" where the biased official did "influence . . . the inquiry").

50. In *Madden v. Chattanooga City Wide Service Dept.*, 549 F. 3d 666 (6th Cir. 2008), a supervisor reported that the plaintiff had been setting off firecrackers on a job site. A senior manager questioned the plaintiff, who admitted he had done so. The plaintiff was fired on the ground that setting off firecrackers posed a safety threat. The senior managers who made the decision "testified at trial that no other incidents involving employee use of firecrackers had been brought to their attention." 549 F. 3d at 670. Other evidence, not unearthed by this "independent investigation," revealed that the supervisor who had reported the plaintiff had concealed from managers the fact that white workers—including the supervisor himself—had not been reported or punished for identical conduct. 549 F. 3d at 677-78. The court of appeals concluded that the employer was liable under those circumstances.

See *Wilson v. Stroh Companies, Inc.*, 952 F. 2d 942, 946 (6th Cir. 1992)(notwithstanding "independent investigation," plaintiff would have had a viable claim if he had offered evidence that the superior who reported him to higher officials "had not reported such misconduct from white employees").

CONCLUSION

The decision of the Court of Appeals should be reversed and the judgment of the district court should be affirmed.

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APPENDIX

APPENDIX

Discriminatory Decisions and Conduct Causing Adverse Employment Action

Discrimination in Reporting Alleged Misconduct

Madden v. Chattanooga City Wide Service Department, 549 F. 3d 666, 678 (6th Cir. 2008)("there was evidence that [biased supervisor] discriminated in the information that he provided about employee misconduct to senior managers by reporting the misconduct of a black employee, but not the virtually identical misconduct of white employees")

Hill v. Lockheed Martin Logistics Mgmnt., Inc., 354 F. 3d 277, 300 (4th Cir. 2004)(Michael, J., dissenting)(biased official used "discretion on whether or not to write up minor mistakes" by filing six reports in three days about errors that were "nitpicky and trivial")

Discrimination in Initiating Disciplinary Action

Simpson v. Diversitech General, Inc., 945 F. 2d 156, 160 (6th Cir. 1991)("If [the biased official] initiated the disciplinary action leading to [the plaintiff's] dismissal due to [the plaintiff's] race, simply showing that [the biased official] had no role in the 'final' decision to terminate him is insufficient to establish that [the employer] would have made the same decision even absent the racial animus")

Appendix

Poland v. Chertoff, 494 F. 3d 1174, 1181 n. 3 (9th Cir. 2007)("district court correctly concluded that [biased official] did make the . . . decision to initiate the administrative inquiry against [plaintiff] and that [biased official's] animus underlying that decision should be imputed to the [employer]")

Kramer v. Logan County School Dist. No. R-1, 157 F. 3d 620, 624 (8th Cir. 1998)("non-renewal of [plaintiff's] contract was initiated by [biased employees]")

Discrimination in Investigating Alleged Misconduct

Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F. 3d 1316, 1323 (8th Cir. 1994)("the undisputed evidence was that [plaintiff's] investigation was different from those of male co-workers. . . . [T]he investigation . . . was . . . 'unusual'")

Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1059, 1060 (8th Cir. 1993)(male officers never investigated by biased official for engaging in same conduct for which official requested investigation of female worker)

Discrimination In Determining Disciplinary Process

Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051, 1055 (8th Cir. 1993)(referring rumored misconduct to security investigations department rather than to usual official)

Appendix

Discrimination In Establishing Applicable Standards

Bergene v. Salt River Project, etc. Dist., 272 F. 3d 1136, 1140, 1141 (9th Cir. 2001)(biased official obtained changes in job requirements in a manner adverse to applicant plaintiff)

Gutzwiller v. Fenik, 860 F. 2d 1317, 1326-27 (6th Cir. 1988)(tenure candidate required to publish two books, rather than the usual one book rule; altering to disadvantage of plaintiff process for selecting outside reviewers)

Discrimination in Providing Information

Laxton v. Gap, Inc., 333 F. 3d 572, 584 (5th Cir. 2003)(biased official was the "primary source of information")

Gee v. Principi, 289 F. 3d 342, 347 (5th Cir. 2002)(biased officials "made comments critical of [plaintiff]" at key meeting)

Christian v. Wal-Mart Sores, Inc., 252 F. 3d 862, 878 (6th Cir. 2001)(biased official's "report was the exclusive and decisive factor in . . . decisionmaking" by the final decisionmaker)

Gusman v. Unisys Corp., 986 F. 2d 1146, 1147 (7th Cir. 1993)("An employer cannot escape responsibility for wilful discrimination . . . when the facts on which reviewers rely have been filtered by a manager

determined to purge the labor force of [members of a protected group]")

Providing False Inculpatory Information

Brewer v. Board of Trustees of University of Illinois, 479 F. 3d 908, 917 (7th Cir. 2007)("influence may be exercised by, among other things, "supplying misinformation or failing to provide relevant information to the person making the employment decision")

EEOC v. BCI Coca-Cola Bottling co., 450 F. 3d at 486 ("A biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected class . . . by selectively reporting or even fabricating information in communications with the formal decisionmaker"), 492 ("[i]f a jury . . . concludes that [the biased official] lied to [the final decisionmaker], it could also find that the [untrue] claims about [the victim's] conduct caused the termination")

Back v. Hastings On Hudson Union Free School Dist., 365 F. 3d 197, 126 (2d Cir. 2004)(biased officials "made numerous accusations of poor performance, which [plaintiff] insists were . . . pretextual"; "the jury . . . could . . . conclude that the [biased officials] proximately caused the termination by fatally tainting the pool of information about [the plaintiff]")

Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F. 3d 277, 300-01 (4th Cir. 2004)(en banc)(Michael, J., dissenting)(biased official allegedly lied to higher officials about non-existent conversation with plaintiff; biased official provided final decisionmaker with "a written statement of his observations about [plaintiff's] performance")

Kramer v. Logan County School Dist. No. R-1, 157 F. 3d 620, 624 (8th Cir. 1998)("material misrepresentations" made to final decisionmakers by biased officials)

Wallace v. SMC Pneumatics, 103 F. 3d 1394, 1400 (7th Cir. 1997)(employer liable where biased official, "by feeding false information to [the final decisionmaker] is the real cause of the adverse employment action")

Withholding Exculpatory Information

Cariglia v. Hertz Equipment Rental Corp., 363 F. 3d 77, 86-87 91st Cir. 2004)(employer liable if biased official "withheld from [final decisionmaker] exculpatory information about [plaintiff's alleged misconduct"; biased official apparently "never divulged to [final decisionmakers] all of the circumstances surrounding the . . . issue")

Wallace v. SMC Pneumatics, Inc., 103 F. 3d 1394, 1200 (7th Cir. 1997)(employer liable where biased official "by . . . feeding false information to [the final decisionmaker] is the real cause of the adverse employment action")

Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051, 1058, 1059 (8th Cir. 1993)(biased official failed to disclose that plaintiff's action did not actually violate any company policy; biased official did not include in his report regarding female worker fact that at least three male officers had engaged in similar conduct)

Jiles v. Ingram, 944 F. 2d 409, 411-13 (8th Cir. 1991)(supervisor failed to disclose that he had expressly authorized conduct to which supervisor then objected)

Discrimination in Annual or Performance Evaluations

Back v. Hastings On Hudson Union Free School Dist., 365 F. 3d 107 126 (2d Cir. 2004)(biased officials issued "a very negative final annual evaluation [of plaintiff]")

Johnson v. Kroger Co., 319 F. 3d 858, 868 (6th Cir. 2003)(biased official "assisted . . . in preparing [the plaintiff's] performance review")

Rose v. New York City Bd. of Ed., 257 F. 3d 156, 158 (2d Cir. 2002)(biased official gave plaintiff "an unsatisfactory evaluation")

Stoller v. Marsh, 682 F. 2d 971, 972 (D.C.Cir. 1982)("[a]n unfavorable employment decision resulting from inaccurate, discriminatorily-motivated evaluations by the employee's supervisors violates Title VII")

Appendix

Earlier Discriminatory Discipline Determining Subsequent Sanctions

Laxton v. Gap, Inc., 333 F. 3d 572, 584 (5th Cir. 2003) (plaintiff dismissed under the employer's "three-strikes-you're-out policy." The first "strike," a "Written Warning," had been issued by the biased official. The second "strike," a "Final Written Warning," had been issued by an official who relied on the biased official as "her primary source of information")

Simpson v. Diversitech General, Inc., 945 F. 2d 156, 160 (6th Cir. 1991)(biased official filed an adverse personnel report regarding the plaintiff, which led the employer to impose on the plaintiff a "Last Chance Agreement" under which he would be fired for any future infraction. A subsequent incident, in which the biased official played no role, resulted under the Agreement in the plaintiff's dismissal. In upholding liability, the court noted that "the [biased official's] actions led to [the plaintiff's] discharge, having formed the predicate for the Last Chance Agreement. . . . [A]bsent [the biased official's] race-based motive, as found by the district court, there would not have been a Last Chance Agreement")

Discrimination in Making Recommendation

Holcomb v. Iona College, 521 F. 3d 130, 143 (2d Cir. 2008)(biased officials "might well have urged the selection [of individual other than plaintiff] out of discriminatory motives")

Appendix

Gillaspy v. Dallas Ind. School Dist., 278 Fed. Appx. 307, 313 (5th Cir. 2008)(final decisionmaker "relied on [biased official's] recommendation")

Back v. Hastings On Hudson Union Free School Dist., 365 F. 3d 197, 126 (2d Cir. 2004)(biased officials "issued a direct recommendation against [giving plaintiff] tenure")

Johnson v. Kroger Co., 319 F. 3d 858, 868 (6th Cir. 2003)(biased official "consulted with [final decisionmaker] prior to her ultimate decision")

Abramson v. William Patterson College of N.J., 260 F. 3d 265, 285 (3d Cir. 2001)(final decisionmaker "sought [biased official's] counsel")

Rose v. New York City Bd. of Ed., 257 F. 3d 156, 158 (2d Cir. 2002)(biased official recommended in favor of dismissal of plaintiff)

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F. 3d 46, 55 (1st Cir. 2000)(final decisionmaker "called [biased official] for his opinion regarding [the plaintiff's] dismissal")

Long v. Eastfield College, 88 F. 3d 300, 307 (5th Cir. 1996)(biased officials made adverse recommendations regarding plaintiff)

Ostrowski v. Atlantic Mutual Ins. Co., 968 F. 2d 171, 174 (2d Cir. 1992)(biased official recommended dismissal of plaintiff).

Discrimination in Evaluating Information

Gutzwiller v. Fenik, 860 F. 2d 1317, 1326, 1327 (6th Cir. 1988)("consistently negative interpretations" by biased officials of outsider reviewer comments on tenure candidate's scholarship; decisionmakers relied on opinion of biased official because of his expertise)

Roebuck v. Drexel University, 852 F. 2d 715, 722-23 (3d Cir. 1988)(letter from biased official adversely evaluating information provided by others)

Discrimination While Participating in Decisionmaking Discussion

Gillaspy v. Dallas Ind. School Dist., 278 Fed. Appx. 307, 313 (5th Cir. 2008)(biased official "met with . . . members of the interview panel to discuss the applicants")

Rivera-Rodriguez v. Frito Lay Snacks Caribbean, 265 F. 3d 15, 27 (1st Cir. 2001)(biased official may have influenced the disputed decision when he "participated in some respect in [the] employment decisions [regarding plaintiff]"; final decisionmaker "discussed his decisions about [plaintiff] with the biased officials")

Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F. 3d 1316, 1323 (8th Cir. 1994)(biased official "participated in the decisions to suspend and terminate" plaintiff)

Appendix

Other Discriminatory Acts

Jiles v. Ingram, 944 F. 2d 409, 411-13 (8th Cir. 1991)(biased official provoked disagreement with plaintiff in order to discipline him for "back talking")

Long v. Eastfield College, 88 F. 3d 300, 308 n. 8 (5th Cir. 1996)(biased officials directed others to send prejudicial statements to final decisionmaker).

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
AUG 31 2010
OFFICE OF THE CLERK

No. 09-400

In the Supreme Court of the United States

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether, and in what circumstances, a jury should hear evidence of the unlawful animus of persons who did not make the adverse employment decision for which the employee-plaintiff seeks to hold the employer-defendant liable.

PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are set forth in the case caption. The corporate disclosure statement contained in the Respondent's Brief in Opposition to Petition for Writ of Certiorari remains accurate.

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5 Restatement (Third) of Torts - PH § 26 15

STATEMENT OF THE CASE

Proctor Hospital is a full-service health care facility serving the residents of Central Illinois. This case is before the Court because Linda K. Buck, Proctor's Vice President of Human Resources, discharged Petitioner Vincent Staub on April 20, 2004. (Record Vol. 5 at 68-71.)[1]

Staub was an angiography technologist ("angio tech") in Proctor's Diagnostic Imaging Department. In addition, Staub had been a member of the United States Army Reserve since at least 1985, including when Proctor hired him in 1990. (Record Vol. 5 at 308-310.)

The Diagnostic Imaging Department is physically divided into two areas. Non-invasive diagnostic imaging services such as radiology, ultra sound, CAT scan, MRI, and mammography are performed in one area. The bulk of the Diagnostic Imaging Department's forty-plus employees perform these non-invasive diagnostic imaging duties. (Record Vol. 5 at 47, 114.) Angiography, an invasive imaging process that involves the injection of dies, is performed in a separate, locked area known as the Angiography

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[1] The Clerk of the District Court delivered the record in five volumes, with Volume 1 beginning at page 1 and all successive volumes beginning at page 24. Citations to the record reflect the volume and page number where the cited material is found.

Suite. (Record Vol. 5 at 137, 144, 322.) Four employees are employed in Angiography: a registered nurse and three angio techs. Angio techs are trained in radiology but also have advanced training which permits them to work in Angiography. (Record Vol. 5 at 310-312.) Thus, Staub and the other angio techs were qualified to work in both areas of the Diagnostic Imaging Department, while the other employees were limited to non-invasive diagnostic imaging duties. (Record Vol. 5 at 93-94, 143.)

Linda Buck had a negative impression of Staub as an employee long before she decided to fire him. This impression was built on a host of incidents, information, and complaints: Staub had been fired previously and returned to work conditionally; his personnel record included documentation of his disappearances from the Department during work hours as well as his resistance to assisting in non-invasive Diagnostic Imaging when his work load in the Angiography Suite was light; anecdotal evidence from Buck's own Human Resources staff demonstrated that Staub was harsh with his coworkers and difficult to work with; at least one other angio tech had complained about Staub's practice of absenting himself from the Department and the fact that he was hard to work with; and even Proctor's Vice President and Chief Operating Officer discussed with Buck the negative reports he had received about Staub's job performance.

Specifically, Buck was aware that Staub was fired for the first time in 1998, prior to her arrival. Although he was conditionally reinstated, the terms of

his reinstatement were documented in his personnel record and included, among other things:

> You will communicate with your supervisor whenever you are leaving the work area. Any trends to the above contingencies or any insubordination, immature behavior, unprofessionalism, or lack of support for management decision, will be grounds for immediate dismissal.

(D. Ex. 2, Record Vol. 3 at 141; Offered at Record Vol. 5 at 149; Admitted at Record Vol. 5 at 396.)

Buck also knew that though Staub was rated technically competent, the narrative portions of his employment evaluations contained consistent negative comments regarding his overall contribution to the Department. His 2002 evaluation observed:

> Vince continues to disappear during scheduled hours and does not voluntarily help during idle time.

(D. Ex. 18, Record Vol. 3 at 162; Offered at Record Vol. 5 at 428; Admitted at Record Vol. 5 at 451.) His evaluation the following year, while again reflecting his considerable clinical skills, contained the following directives:

> Vince will accept extra tasks when told.

> He needs to be self-motivated to seek needs of the department.
>
> I want Vince to be aggressive in his attempt to work throughout the Dept. I also want Vince not to go on the defensive when questioned. Angio at Proctor is also a part of diagnostics and work needs to be in both areas.

(P. Ex. 32, Record Vol. 3 at 132, 135; Offered at Record Vol. 5 at 132; Admitted at Record Vo. 5 at 162.)

In addition to her awareness of issues documented in Staub's reinstatement and evaluation materials, Buck received ongoing negative reports about Staub from multiple sources. (Record Vol. 5 at 74.) In her first year of employment at Proctor, Buck "heard frequent complaints" about Staub. (Record Vol. 5 at 74.) In 2002, Employment Specialist Mandy Carbiledo, whose job was to recruit angio techs, informed Buck that a recently hired tech, Cindy Herbold, resigned because she could not work with Staub. (Record Vol. 5 at 75, 90.) Herbold told Carbiledo that Staub made her feel like the "gum on the bottom of his shoe". (Record Vol. 5 at 90.) In November 2002, Nurse Recruiter Sheila Johnson reported to Buck that a registered nurse in Angiography had quit, and that she had a difficult time recruiting nurses to work there in general, because of Staub's reputation and the fact that people did not want to work with him. (Record Vol. 5 at 90-91.) In 2002, Doneda Halsey, who works with

students from radiology schools, complained to Buck about Staub's flirtatious behavior toward the students. (Record Vol. 5 at 92.)[2]

In late 2003, Administrative Director of Radiology Michael C. Korenchuk, the head of the Diagnostic Imaging Department, reported to Buck that he was having difficulty getting Staub and the other angio techs to assist in non-invasive Diagnostic Imaging when they did not have Angiography cases. Subsequently, Brenda Carothers, the Director of Human Resources who reported to Buck, informed Buck that to address the issue they had conducted a meeting and made the angio techs aware that they were to cover in non-invasive Diagnostic Imaging when they had no cases in Angiography. (Record Vol. 5 at 93-95.)

Buck was also aware that Staub and Leslie Sweborg, another angio tech, were the subject of discipline issued to them on January 27 and 28, 2004, respectively, for their failure to assist in non-invasive Diagnostic Imaging on January 26. Carothers reviewed the facts and recommended the written discipline. Carothers reviewed the factual background with Buck prior to it issuing. (Record Vol. 5 at 80,

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[2] When Buck received the negative reports about Staub, she followed up with the Diagnostic Imaging Department regarding the reports. (Record Vol. 5 at 74-75.) In response to the reports of flirtatious behavior, Buck informed the Department head that he needed to address that behavior. (Record Vol. 5 at 109.)

95-97; D. Ex. 3, Record Vol. 3 at 142; Offered at Record Vol. 5 at 179; Admitted at Record Vol. 5 at 396.)

While the occurrences outlined above colored Buck's view of Staub, they did not set off the chain of events which resulted in his termination. Rather, the ultimate trigger occurred on March 26, 2004, when another angio tech, Angie Day, appeared in the Human Resources Department to lodge a complaint against Korenchuk. Essentially, Day complained that Korenchuk had been disrespectful of her, chastising her loudly in front of other employees. According to Day, Korenchuk attempted to rectify his conduct by apologizing in a disingenuous manner and compounded his error by blowing kisses at her. Day was so upset with Korenchuk that she threatened to quit. Upon hearing this, Buck decided that Korenchuck's conduct should be brought to the attention of his boss, Vice President and Chief Operating Officer R. Garrett McGowan. Buck arranged a meeting with Day, Korenchuk, and McGowan on April 2, 2004. (Record Vol. 5 at 97-99.)

The first part of the meeting involved Buck, Day, and McGowan. Day was asked to tell McGowan her story.[3] She repeated her previously-made complaints about Korenchuk. McGowan then

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[3] There is no evidence that McGowan, a four-year veteran who served with the First Marine Division in Viet Nam running an intensive care facility in the field, harbors any animus toward Staub on account of his military service. (Record Vol. 5 at 537-538.)

summoned Korenchuk to the meeting and Day again repeated her complaints concerning his conduct. Day went on to add that she also had complained to Korenchuk regarding Staub's behavior toward her and that Korenchuk had failed to act on her complaints. She relayed that Staub was not helpful, abrupt, hard to work with, and would absent himself from the Department. (Record Vol. 5 at 73-74.) Day complained that even though she had brought this to Korenchuk's attention previously, he did nothing about it. (Record Vol. 5 at 99-101.)

After Korenchuk apologized to Day for his behavior, Day was excused from the meeting. (Record Vol. 5 at 100-101.) McGowan chastised Korenchuk for his conduct and then went on to discuss Staub.

Just as with Linda Buck, Staub was no stranger to McGowan at the time of the meeting. McGowan had previously heard from various sources within the Hospital that there were issues involving Staub's behavior, including that Staub would absent himself from the Department. (Record Vol. 5 at 101, 540.) In fact, even prior to the meeting involving Day, McGowan had talked with Korenchuk about Korenchuk's apparent inability to manage Staub. (Record Vol. 5 at 539.) Thus, before ending the meeting McGowan directed Korenchuk to develop a plan of action for dealing with Staub's behavior. (Record Vol. 5 at 541.) When Korenchuk complained that it was difficult to manage someone who is not in sight, McGowan told him to seek the assistance of Buck and the Human Resources Department in

developing the plan to manage Staub. (Record Vol. 5 at 101, 541.)

When Korenchuk and Buck met in her office pursuant to McGowan's directive, Buck already possessed a substantial amount of negative information relative to Staub's employment performance. Korenchuk appeared for the meeting and told Buck that he had been looking for Staub but could not find him. Upon hearing that statement, Buck decided to discharge Staub telling Korenchuk: "I think we need to terminate him". (Record Vol. 5 at 102.) Korenchuk agreed only "reluctantly". (Record Vol. 5 at 69.) However, the discharge decision was made by Buck. (Record Vol. 5 at 102-104, 145.)[4]

At approximately 2:30 p.m. on April 20, Korenchuk called Buck and said he would bring Staub to the Human Resources Department as soon as he could find him. At approximately 2:45, Korenchuk and Staub appeared in Buck's office. (Record Vol. 5 at 104.) By Staub's account the termination meeting lasted five minutes. Buck showed him the termination notice. (D. Ex. 5, Record Vol. 3 at 144; Offered at Vol. 5 at 145; Admitted at Vol. 5 at 396.) Staub read it. Korenchuk explained to him that he could not find him and he was not where he was supposed to be. Staub protested and gave his explanation of his whereabouts.

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[4] Buck testified that this meeting occurred on April 19 and the discharge occurred on April 20. (Record Vol. 5 at 78-79.) Korenchuk testified it was his recollection that both occurred on the same day. (Record Vol. 5 at 128-129.)

He was asked to sign the termination report but refused to do so. He requested a copy of his personnel file. He then was escorted to the Diagnostic Imaging Department, picked up his personal items, and left the Hospital. (Record Vol. 5 at 384-386.)

The Hospital's employment policies gave Staub the right to grieve the termination decision. (Record Vol. 5 at 104.) On April 25, Staub filed a written grievance with Buck protesting his termination. (Record Vol. 5 at 104, 386; P. Ex. 28, Record Vol. 3 at 59-63; Offered at Record Vol. 5 at 86; Admitted at Record Vol. 5 at 162.) Buck considered Staub's arguments including his claim that the January 27 corrective action was false, but ultimately denied his grievance. (Record Vol. 5 at 88, 107.) She issued her written determination on May 3, 2004. (D. Ex. 59, Record Vol. 3 at 160; Offered at Record Vol. 5 at 408; Admitted at Record Vol. 5 at 409.) On May 5, Staub filed another grievance directly with Hospital President and CEO Norman H. LaConte.[5] (Record Vol. 5 at 386; P. Ex. 27, Record Vol. 3 at 53-58; Offered at Record Vol. 5 at 386; Admitted at Record Vol. 5 at 395.) Unilaterally concluding that his discharge would not be overturned, Staub filed the instant action. (Record Vol. 5 at 543.)

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[5] There is no evidence that LaConte, an Air Force veteran and a former member of the National Guard, harbored any animus toward Staub on account of his Reserve service. (Record Vol. 5 at 531-532.)

SUMMARY OF THE ARGUMENT

To establish a violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4311, an employee must show causation. He must show that the person who made the adverse employment decision was motivated to do so by an unlawful purpose. The discriminatory animus of a non-decision maker is irrelevant unless that animus motivated the adverse employment action.

There are two facts in this case which are undisputed. First, Linda K. Buck made the decision to discharge Staub. Second, Buck harbored no military animus toward Staub.

From the inception of this litigation, Staub fought to place before the jury evidence of animus on the part of two persons, Korenchuk and Mulally, who unquestionably did not make the decision to discharge him. Proctor resisted Staub's efforts at every turn, arguing that unless he could somehow connect the animus he attributes to Korenchuk and Mulally to Buck's decision to terminate him, such evidence was irrelevant and highly prejudicial. Ultimately, the district court dumped the entire dispute into the lap of the jury, instructing it to determine what evidence was relevant and what evidence was not.

The Seventh Circuit reversed the district court, holding that prior to allowing such highly prejudicial evidence to be presented to a jury, a trial court should at least make a preliminary determination of whether

the evidence is sufficiently relevant to the jury's consideration of what motivated the decision maker. Unquestionably, the district court failed to make that preliminary determination in this case. After reviewing the trial record, the Seventh Circuit concluded that there was insufficient evidence for a reasonable jury to find that the animus attributed to Kornechuk or Mulally motivated Buck to terminate Staub, and that without it he had no case. The Seventh Circuit ordered the district court to enter judgment in favor of Proctor.

Staub's only evidence to connect the animus he attributes to Mulally to Buck's decision to fire him is a written reprimand he received on January 27 stemming from events that occurred the previous day. He argues Mulally falsely procured the discipline which Buck took into account in reaching her determination. The problem with Staub's argument is that Mulally was little more than the messenger with respect to the events of January 26. The seminal event that day -- Staub's failure to respond to calls for help with an overwhelming patient load in non-invasive Diagnostic Imaging -- was reported by radiologist Heather Dunne, not by Mulally. Confirmation that Staub indeed was available to assist in non-invasive Diagnostic Imaging came from registered nurse Angie Bell, angio tech Leslie Sweborg and the computer tomographer -- not from Mulally. The decision to issue the written warning was recommended by the Director of Human Resources, Brenda Carothers, and was fully vetted with Buck beforehand. Staub even filed a grievance admitting the damning facts. In short, there

is no evidence that Mulally falsified or exaggerated the facts that necessitated the January 27 discipline. Staub cannot connect the animus he attributes to Mulally to Buck's decision to fire him.

Staub has even more trouble connecting the animus he attributes to Korenchuk to Buck's decision. His evidence of animus is two statements which, by Staub's own admission, were made at least six years prior to his discharge. No Circuit would allow such stale evidence of animus to be presented to a jury. Moreover, an intervening event -- Staub's December 2003 nomination and procurement of a "MY BOSS IS A PATRIOT" award for Korenchuk from the Assistant Secretary of Defense -- severed any causal link between the statements attributed to Korenchuk and the decision to discharge Staub. Just as with Mulally, Staub cannot connect the animus he attributes to Korenchuk to Buck's decision to fire him.

Thus, there is an absolute dearth of evidence to connect the animus Staub attributes to Mulally and Korenchuk to Buck's decision to fire him, regardless of what standard is employed to determine when such evidence becomes relevant. Nevertheless, Staub attacks the Seventh Circuit's "singular influence" standard.

USERRA, unlike most other federal anti-discrimination statutes, is unique in that it provides for both personal liability of the supervisor who makes the unlawful decision and vicarious liability of the employer. Consequently, the Seventh Circuit's

"singular influence" standard is particularly appropriate in USERRA cases. Had Staub named Buck as a defendant in the action, she would have been dismissed before the case even reached a jury. After all, Staub concedes he has no evidence that Buck was unlawfully motivated in any respect. And if Buck -- the undisputed decision maker -- could not be held liable, Proctor could not be held vicariously liable for her decision. Unless, of course, Buck was not the real decision maker but rather a dupe of someone with discriminatory motivation -- someone who exercised such singular influence over her as to be the real decision maker.

Regardless of the standards they might apply to determine when the animus of a non-decision maker is relevant to an adverse employment action, the Circuits uniformly agree that an independent decision, even an independent review of the facts giving rise to a possibly tainted decision, breaks the chain of causation. Buck's decision in this case was independent. Moreover, Staub took the opportunity to plead his case to Buck both at the time of his termination and in a subsequently-filed grievance. Buck reviewed his personnel record, considered his grievance, and reflected on information from other sources regarding the history of Staub's checkered employment performance. She did not change her mind and denied his grievance.

Staub's principle complaint regarding Buck's review is that she allegedly did not investigate the animus he attributes to Mulally and its impact on the

January 27 discipline. However, Staub simply ignores the fact that Buck *did* investigate his claim regarding the January 27 discipline at the time he filed his grievance. She discussed the claim with the Director of Human Resources, Brenda Carothers, who had recommended the issuance of the Corrective Action and had personally discussed the Corrective Action with Staub following its issuance. Moreover, Staub conveniently overlooks Buck's involvement in the discipline at the time it was made. The facts were presented to her. She and the Director of Human Resources reviewed the recommended discipline before it was ever issued. Requiring her to review in greater detail a matter as to which she was fully informed and obviously approved is akin to requiring her to perform a useless act.

Staub simply cannot show that the alleged animus motivated Buck's decision to terminate him. Not only is there insufficient evidence to link any purported animus to the termination decision, Linda Buck came to her own independent decision based on a host of other considerations. She was not the dupe, the pawn, the ultimate rubber stamper -- she made the termination decision independently without motivation of animus. To hold Proctor liable in such a situation would be contrary to law and informed human resources practices.

ARGUMENT

I. USERRA REQUIRES A PLAINTIFF TO ESTABLISH CAUSATION.

For an employer to be liable for discrimination under USERRA, an employee must establish causation -- that is, show that his military status was a "motivating factor" in the adverse employment action. *See* 38 U.S.C. § 4311(a), (c)(1). Military status is a motivating factor if the defendant "relied on, took into account, considered, or conditioned its decision on that consideration." *Dees v. Hyundai Motor Mfg. Alabama, LLC*, No. 09-12107, 2010 WL 675714, at *2 (11th Cir. Feb. 26, 2010).

When considering whether to hold an employer liable for a termination decision allegedly fueled by unlawful animus, "the focus is on the question of *causation*." *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 804 (9th Cir. 2009) (emphasis in original). "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." 5 Restatement (Third) of Torts-PH § 26. However,

> [i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful

> acts, and would set society on edge and fill the courts with endless litigation.

Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 266 n.10 (1992).

Thus, proximate causation must also exist. *See id.* at 287 ("it has always been the practice of common law courts (and probably of all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct") (Scalia, J., concurring); *see also Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 560 n.16 (5th Cir. 1998) (any employer liability is limited by familiar tort principles -- there must be both legal and proximate cause for damages to arise); *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 615 (7th Cir. 2002) (under general tort principles governing causation, a plaintiff may only recover damages proximately caused by the defendant's conduct). Proximate cause consists of

> the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient. Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between

> the injury asserted and the injurious conduct alleged.

Holmes, 503 U.S. at 268 (internal citations omitted).

In analyzing a discrimination claim, the determinative question is whether the employee has submitted evidence that the prescribed "animus" was a cause of the termination. *Wilson v. Stroh Cos., Inc.*, 952 F.2d 942, 946 (6th Cir. 1992). If the actual decision maker ultimately terminated an employee for reasons untainted by any prejudice against those performing military service, the causal link between that prejudice and the termination is severed. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *Equal Employment Opportunity Comm'n v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487-88 (10th Cir. 2006) (plaintiff must demonstrate a causal connection between the alleged harm and the injury).

> We have previously stated the general proposition that in some cases, a discharge recommendation by a party with no power to actually discharge the employee may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge. However, as we have recently explained, this causation must be truly direct. When the biased recommender and the actual decision maker are not the same person or persons, a plaintiff may not benefit from the inference of

> causation that would arise from their common identity. Instead, the plaintiff must prove that the discriminatory animus behind the recommendation, and not the underlying employee misconduct identified in the recommendation, was an actual cause of the other party's decision to terminate the employee.

Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1331 (11th Cir. 1999) (internal citations omitted).

Practically speaking,

> [t]o establish the essential element of causation in a subordinate bias case -- where the investigation that led to the adverse employment decision was initiated by, and would not have happened but for, the biased subordinate -- the plaintiff must show that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or the investigation leading thereto.

Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007). Any alternate causation analysis "as applied within the context of the employment setting, cannot be taken so literally as to convert into a constitutional tort a subordinate supervisor's mere participation in,

while performing her normal supervisory responsibilities, the initiation of a disciplinary process that results in an employee's otherwise appropriate and lawful termination." *Lakeside-Scott*, 556 F.3d at 805.

The mere fact that a non-decision maker possesses animus is not enough to establish causation. Under such a standard,

> any time a biased employee, in response to a plaintiff's protected activity, sets in motion the process that leads to an adverse employment action, the employer would be liable, even if the employer then conducted an entirely independent inquiry and decision-making process insulated from the animus of the biased employee, and no matter how compelling the nondiscriminatory grounds for taking the adverse action....As the Tenth Circuit has observed, such a lenient standard can "weaken the deterrent effect of subordinate bias claims by imposing liability even where an employer has diligently conducted an independent investigation." *BCI*, 450 F.3d at 487. Also, such a broad conception of liability is inconsistent with tort law principles of causation that apply to civil rights claims. Restatement (Second) of Torts § 431 cmt. a (1965) ("In order to be a legal cause of another's harm, it is not enough

> that the harm would not have occurred had the actor not been negligent."). Thus, "but for" causation in this context is not of itself sufficient to impute the subordinate's bias to his employer.

Poland, 494 F.3d at 1181-82.

Thus, to establish Proctor's liability in this case, there must be a true causal link between his evidence of military animus and the injury Staub sustained -- that is, his termination.

II. STAUB PRESENTED NO EVIDENCE TO THE JURY LINKING THE ANIMUS HE ATTRIBUTES TO MULALLY TO THE DISCHARGE DECISION MADE BY BUCK.

Janice Mulally was a staff technologist in the MRI section of non-invasive Diagnostic Imaging, primarily performing mammography and related services. (Record Vol. 5 at 164.) In addition to her clinical work, Mulally aided Korenchuk in certain administrative tasks such as preparing schedules and assisting with evaluations. She had no authority to discharge employees. (Record Vol. 5 at 114-115.) Despite Proctor's objection, Staub was permitted to introduce to the jury "abundant evidence of Mulally's

animosity" and "the strongest proof of anti-military sentiment came from [this] evidence". (J.A. 49a.)[6]

It is undisputed both that Buck made the decision to terminate Staub's employment and that she harbored no animus toward Staub based upon his Reserve status. There is no evidence in the record that Buck consulted with Mulally or sought her input prior to deciding to terminate Staub. Moreover, there is no evidence that Mulally even knew of Buck's plan to terminate Staub until after the event took place.

In discharging Staub, Buck took into account the discipline he received on January 27, 2004. Staub argues that this Corrective Action was deceptively procured by Mulally to effectuate his termination. However, the evidence presented to the jury provides no support whatsoever for his argument.

Non-invasive Diagnostic Imaging was a very busy place on January 26, 2004. The radiologic technologist that day was Heather Dunne. She was performing x-rays for in-patients, out-patients, emergency room patients, and surgery patients, with the assistance of only a student technologist. (Record Vol. 5 at 470-472.) She testified that between 8:30 and 8:45 a.m. she had "at least four to five patients" waiting for x-rays. (Record Vol. 5 at 472-473.) She passed Angie Bell, the registered nurse assigned to the

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[6] "Anti-military" may not be the appropriate term to describe Mulally whose only son, a Navy Seal, served two tours of duty in the Middle East. (Record Vol. 5 at 178.)

Angiography Suite, in the hallway. Dunne asked Bell if they were busy in Angio and Bell told her they were not. (Record Vol. 5 at 473.) Bell testified she specifically told Dunne: "We don't have any cases right now". (Record Vol. 5 at 485, 495.)

The angio techs in the Angiography Suite that morning were Staub and Sweborg. Dunne's understanding with respect to the angio techs was that "if they weren't doing any patients, they were to come over to the department where I worked to help do patients". (Record Vol. 5 at 480.) Dunne called the Angiography Suite for help. No one answered the telephone. (Record Vol. 5 at 473-474.)

Dunne x-rayed another patient. She again called the Angiography Suite for help. No one answered the telephone. (Record Vol. 4 at 474.) In the meantime, the number of patients awaiting x-rays increased. As a last resort Dunne then called Mulally, who was working in the MRI section, and told her what was happening. Mulally told Dunne she would get someone to help her. (Record Vol. 5 at 475.)

Mulally called the Angiography Suite and Sweborg answered. Mulally asked if there were cases in Angio and Sweborg confirmed that "no" there were not. (Record Vol. 5 at 180.) The computer tomography scheduler also advised Mulally that the only case scheduled in Angio that day had canceled. (Record Vol. 5 at 181.) Mulally spoke to Bell who told her "that by 8:10 a.m. that morning they knew that they had no case, no patients". (Record Vol. 5 at 182.)

With Korenchuk accompanying her, Mulally approached Sweborg. She asked Sweborg to confirm that there were no angio patients between 8:10 a.m. and when Dunne called her at 9:44 a.m. Sweborg responded: "Yes, that's true". (Record Vol. 5 at 182-183.)

Based on the various reports of others and Sweborg's own confirmation, Mulally then told Korenchuk that she thought Staub and Sweborg should be disciplined in writing for not assisting in non-invasive Diagnostic Imaging. Korenchuk agreed. (Record Vol. 5 at 183.)

Brenda Carothers was the Director of Human Resources reporting directly to Buck. (Record Vol. 5 at 95.) Mulally met with Carothers to review the proposed discipline. (Record Vol. 5 at 185.) Carothers then met with Buck. Buck recounted Carothers's report:

> She told me that there had been no cases in angio from 8:00 to 9:30, and that another employee from diagnostic imaging had to call angio to request help and that she called several times and there was no answer. And based on that and the documentation she received from Jan [Mulally] that she [Carothers] was recommending a written warning.

(Record Vol. 5 at 96.) Mulally drafted the Corrective Action. It was signed by Carothers, Korenchuk, and Mulally.

Carothers, Korenchuk, and Mulally met with Staub the next day to deliver the Corrective Action. (Record Vol. 5 at 185-186.) Following the meeting, Carothers spoke to Staub directly about the events set forth in the Corrective Action. (Record Vol. 5 at 370.) In addition to detailing the events of January 26, 2004, the Corrective Action instructed Staub to remain in the Diagnostic Imaging Department area at all times and to report to Korenchuk or Mulally if he went elsewhere. (D. Ex. 3, Record Vol. 3 at 142; Offered at Record Vol. 5 at 179; Admitted at Record Vol. 5 at 396.) A substantially similar document was delivered to Sweborg when she returned to work the next day.[7]

The events giving rise to the January 27 Corrective Action were all reported to Mulally by sources (Dunne, Bell, and Sweborg) who held absolutely no animus toward Staub. Mulally did not fabricate or exaggerate the facts. Mulally reviewed those facts with Human Resources before the discipline issued. Carothers personally reviewed the facts, then discussed the matter with Buck, and

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[7] Both written disciplines were drafted on January 27. However, Sweborg did not work on January 27, so the written discipline was delivered to her on January 28 and the date changed to reflect the date of delivery. (Record Vol. 5 at 188-190; P. Ex. 26, Record Vol. 3 at 52; Offered at Record Vol. 5 at 123; Admitted at Record Vol. 5 at 162.)

recommended the discipline. (Record Vol. 5 at 80, 95-96.)

On February 3, 2004, Staub filed a grievance. (P. Ex. 22, Record Vol. 3 at 73; Offered at Record Vol. 5 at 393; Admitted at Record Vol. 5 at 395.) His grievance confirms the facts as they were reported to Mulally:

> I came into work around my scheduled time of 0800hrs on the morning of 1-26-04, to be told as soon as I crossed the ante-room threshold by coworkers Leslie Sweborg and Angie Bell that I had three messages to return phone calls. These messages regarded action to be taken as my ordinary routine daily activities with the Purchasing Dept. and Mary Jo Carnell about supplies ordered, Jamie Defenbaugh, the Merit Corp. sales rep. regarding changing supplies in our packs to fit the needs of one of our 5 interventional radiologist, and Julie in the Billing and Coding office. I proceeded to call these individuals and take care of routine Angio Department maintenance. At some point during taking care of these tasks I spoke with Interventional Radiologist Kenneth Moresco, who informed me that our two morning patients had cancelled due to various reasons. I then proceeded to speak with Dr. Moresco about additional

> supplies that needed to be ordered for future cases and stenting longer superior femoral arterial lesions and he then informed me that he was on his pager and would be proceeding down to OSF to do cases down there and to page or call him on his cell phone if he is again needed at Proctor which is a practice of CIRA and their group if our schedule is light. I then continued to work on billing problems that were presented to me previously that were outstanding in collecting because they had not received modifiers, which I am the only person presently doing this and held responsible in Angio.
>
> At approximately 0930hrs Leslie came to me in Angio from the ante-room to tell me Jan Mulally called and said one of us had to go into the diagnostic department to work and one of us had to go up to surgery now to help the surgery technologist who had multiple cases.

From 8 a.m. until at least 9:30 a.m. Staub performed "routine" duties, talked on the telephone, and shuffled paper as the number of patients waiting in non-invasive Diagnostic Imaging grew larger. Sweborg testified that she spent a portion of that time putting supplies away and "studying". (Record Vol. 5 at 286.) Neither bothered to answer the telephone when Dunne repeatedly called for help.

By trial time, Staub and Sweborg had changed their tune. They testified they had a patient in Angiography which would have prevented them from assisting Dunne in non-invasive Diagnostic Imaging for at least a portion of the time prior to receiving Mulally's call. While their position is facially plausible, it would not, even if true, demonstrate that Mulally fabricated or misrepresented the facts in order to procure Staub's discipline. "The Court evaluates the legitimacy of the decision maker's decision based on the information available to him or her at the time of the decision." *Jenks v. City of Greensboro*, 495 F. Supp. 2d 524, 529 (M.D.N.C. 2007). Even if there had been a patient in Angiography, no one advised Mulally of that fact. "It is only the decision maker's belief at the time that the decision is made that is the relevant inquiry–not whether the information is later proven to be false." *Id.*; *see also Amadio v. Ford Motor Co.*, 238 F.3d 919, 928 (7th Cir. 2001); *Johnson v. Weld County*, 594 F.3d 1202, 1211-12 (10th Cir. 2010). Bell, the angio nurse, told Mulally they knew by 8:10 a.m there would be no Angio cases that day. Sweborg told Mulally there were no angio patients between 8:10 a.m. and 9:44 a.m. that day. The computer tomography scheduler told Mulally that the only angio patient scheduled that day had cancelled. Even more telling, when Staub filed his grievance -- after having had a week to think about it -- he made no mention of a patient in Angiography. Mulally's belief at the time, shared by Korenchuk and Carothers, was that there was no patient in angio.

Staub also claims the Corrective Action was unfair because he had no idea that waiting patients in non-invasive Diagnostic Imaging should take precedence over his routine duties in Angio. Staub denies he was admonished during the December 9, 2003 meeting referenced in the Corrective Action to report to non-invasive Diagnostic Imaging when he had no patients in Angio. However, Staub was the only person at that meeting who does not recall the admonition. The two other non-supervisory employees in attendance, Bell and Sweborg, recalled the warning. Bell testified:

> Q. What did they [Korenchuck and Mulally] say?
>
> A. They more or less were reminding us that if cases were done in angio that the techs still need to go over to the department and help.
>
> Q. They need to go help?
>
> A. And the RNs, we can go over also and see if there is stuff that we could help out.
>
> Q. Not that the department is going to call you, but if you have no case you were to go over there?
>
> A. We were to call there and check to see if they needed us.

(Record Vol. 5 at 487-488.) Sweborg also recalled the instruction at the time of her deposition but her memory "faded" somewhat between then and the time of trial:

> Q. And do you recall, Miss Sweborg, during this meeting or in your deposition I asked you, quote, "In this December 9th meeting was there a specific discussion though about what you angio techs were supposed to do as far as helping out in diagnostic?"
>
> Do you remember me asking you that question?
>
> A. No, I don't really.
>
> Q. Do you remember what your response was?
>
> A. No.
>
> Q. Would it surprise you that your response was, "The only discussion was that we needed to go help them if they–if we did not have cases."
>
> Do you recall that?
>
> A. No, I don't.

(Record Vol. 5 at 279.) In addition, Buck knew about the December 9 meeting and instruction because Carothers had reported it to her. (Record Vol. 5 at 93-95.)

Furthermore, even if he legitimately failed to recollect the events of December 9, Staub had been exhorted, as recently as his December 2003 evaluation, to help with the work load in non-invasive Diagnostic Imaging:

> I want Vince to be aggressive in his attempt to work throughout the Dept. I also want Vince not to go on the defensive when questioned. Angio at Proctor is also a part of diagnostic and work needs to be in both areas.

(P. Ex. 32, Record Vol. 3 at 135; Offered at Record Vol. 5 at 132; Admitted at Record Vol. 5 at 162.) It was a repeat of the theme of his prior evaluation:

> Vince continues to disappear during scheduled hours and does not voluntarily help during idle time.

(D. Ex. 18, Record Vol. 3 at 162; Offered at Record Vol. 5 at 428; Admitted at Record Vol. 5 at 451.)

Time and time again Staub was admonished to help in non-invasive Diagnostic Imaging when he did not have patients in Angio. On January 26, he once again refused to do so. The information reported in

the Corrective Action came entirely from those who bore no animus. The Corrective Action was reviewed and recommended by Carothers and further reviewed with Linda Buck, neither of whom bore any animus. Buck did not consult with Mulally or ask for her input prior to terminating Staub. With no link to Buck's termination decision, any animus attributable to Mulally cannot support a finding of liability. Therefore, evidence of that animus should not have been presented to the jury.

III. STAUB PRESENTED NO EVIDENCE TO THE JURY LINKING THE ANIMUS HE ATTRIBUTES TO KORENCHUCK TO THE DISCHARGE DECISION MADE BY BUCK.

Staub's proffered evidence of Korenchuk's animus was inadequate to establish even an inference of unlawful motivation. His evidence was limited to two derogatory remarks. He testified that on one occasion Korenchuk referred to "drill weekends as a bunch of smoking and joking and waste of taxpayer money" and on another he referred to Staub's two week annual training assignment as "Army Reserve bullshit". Both of these incidents occurred in 1998 or sometime prior thereto according to Staub. (Record Vol. 5 at 342-344.)

By December 2003, his view had changed substantially. A scant four months before his discharge, Staub presented Korenchuk with a "MY BOSS IS A PATRIOT" award. (D. Ex. 7, Record Vol. 3 at 146-148; Offered at Record Vol. 5 at 64; Admitted at

Record Vol. 5 at 396.) Staub procured the award from the Office of the Assistant Secretary of Defense. In order to qualify Korenchuk for receipt of the award, Staub submitted a nomination petition wherein he stated:

> My boss is very supportive of the Operation Enduring Freedom that I have been called for active duty for and mobilized. He shows complete concern and compassion for myself and my family. He conveys gratitude for my service to man, god and our country. As an employer, he is truly an asset to the U.S. Army Reserve and all of our principals we stand for.

(Record Vol. 3 at 148.)

Richardson v. Sugg, 448 F.3d 1046 (8th Cir. 2006), presented a similar factual situation. Nolan Richardson, distinguished basketball coach of the Razorbacks of University of Arkansas–Fayetteville, alleged he was discharged on account of his race. Richardson's principal evidence consisted of a statement wherein athletic director J. Frank Broyles used the word "nigger" during a sports banquet held two years before Richardson's termination. Affirming the district court's decision in favor of the defendants, the Eight Circuit discussed the effect of subsequent events and the passage of time on the causal link between discriminatory statements and a later adverse employment action:

And though the district court discounted it, we find the span of time between Broyle's remarks and the decision to fire Richardson relevant to a determination of whether discriminatory animus motivated the firing. *See Simmons v. Oce-USA, Inc.*, 174 F.3d 913, 916 (8th Cir. 1999).

We need not weigh in on the correctness of the district court's finding that Broyle's remarks at the sports banquet were "direct" evidence evidence strong enough to causally link the statement to adverse employment actions–of racial animus in employment actions taken before October 2000. That is because Richardson was fired nearly two years later, and we agree with the district court's finding that Richardson and Broyles had made amends by then. The importance of the ample record evidence of the goodwill between Broyles and Richardson is that it substantially severs any possible causal link between the comments Broyles made at the [October] 2000 sports banquet, and any animus Broyles allegedly might have had toward Richardson at that time, and the decision to fire Richardson in 2002.

Further, the time span between the comments and Richardson's firing

> required Richardson to establish a causal link. "Because the [racially charged] statements [by a supervisor] and the adverse employment decision were not close in time, [separated by some two years,] [plaintiff] must establish a causal link between the comments and his termination." *Id.* at 916. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995) ("[W]e [have] held that a four-year gap between the statement and the termination rendered the statement effectively stale when it came to allowing an inference of intentional discrimination. Because these statements had an insufficient causal relationship to the actual decision to terminate, we [have] ruled that they could not support a jury finding of intentional discrimination.").

Richardson, 448 F.3d at 1058-59.

In this case, the MY BOSS IS A PATRIOT award is "ample evidence" that by December 2003 Korenchuk was not a person with animus toward Staub on account of his service in the Reserve. There was additional contemporary evidence, such as the evaluations provided to Staub in 2002 and 2003 touting his clinical skills as well as numerous compliments made to Staub, demonstrating that Korenchuk did not hold Staub's Reserve activities against him. (Record Vol. 5 at 329.) Moreover, the

comments Staub attributes to Korenchuk were so remote in time (six years prior to the discharge decision) that they could not legally support an inference of unlawful motivation.

Staub also testified Korenchuk was concerned about the expense of hiring temporary replacements during his military deployment.[8] This does not demonstrate animus on the part of Korenchuk because Staub did not produce any evidence linking the deployment related expenses to Korenchuk's compensation or his department's budget. Simply put, Korenchuk had no economic incentive to discriminate against Staub on account of his military duties, and therefore such comments are not evidence of military animus. *See, e.g.*, *Larimer v. Int'l Bus. Machs. Corp.*, 370 F.3d 698, 701 (7th Cir. 2004) (finding no discrimination on account of plaintiff's medical expenses where supervisors had no financial incentive to terminate plaintiff because neither compensation nor department budget was tied to cost of employee medical expenses); *Kapetanovich v. Rockwell Int'l, Inc.*, No. 92-3018, 1994 WL 530912, at *3 (3d Cir. July 15, 1992) (same).

Again, it is undisputed that Buck made the decision to fire Staub. Korenchuk did not want to

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[8] The expense of covering for Reservists during absences does not motivate Proctor's employment decisions. It is undisputed that Proctor employed at least five other Reservists at the time it employed Staub. Staub was the only Reservist employed by Proctor to receive discipline. (Record Vol. 5 at 525.)

discharge Staub and did not make that decision. In fact, he went along with Buck's termination decision only "reluctantly".[9] (Record Vol. 5 at 69.)

When Buck and Korenchuck met, pursuant to McGowan's directive to come up with a plan for dealing with Staub, Korenchuk told Buck he had been looking for Staub and could not find him. Upon

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[9] At page 39 of his Brief, the Petitioner states:

> Proctor Hospital did not "have to" place the ultimate decision to fire Staub in the hands of "someone removed from the underlying situation." The hospital could, for example, have chosen to give that authority solely to Korenchuk. Proctor was not entitled, by giving to one official responsibility for reporting "the underlying situation" and to another the official responsibility for making the "ultimate decision," to escape legal liability for the discriminatory actions of the former.

The Petitioner makes it sound as if the Hospital intentionally utilizes Buck to make all discharge decisions to insulate itself from potential liability of biased subordinates. Nothing could be further from the truth. Korenchuk had the authority to discharge Staub and, in fact, had done so in 1998. (Record Vol. 5 at 149, 431.) There was no evidence presented to the jury to the effect that the Hospital assigned Buck to make all discharge decisions. The only reason Buck was involved in the decision to discharge Staub is that McGowan directed her to assist Korenchuk in developing a plan for dealing with Staub's habit of disappearing from the work area. (Record Vol. 5 at 101, 541.) Proctor did not give one official the responsibility for reporting the underlying conduct and another the responsibility for making the discharge decision.

hearing this, Buck had had enough and decided that the best way to deal with Staub was to terminate him.

Staub argues that Korenchuk made a false report to Buck in order to procure his discharge. Staub testified that the reason Korenchuk could not find him is that he and Swebo g were having lunch. Staub testified that he attempted to find Korenchuk to advise him they would be in the cafeteria but he was not in his office. Staub says that he left a voicemail for Korenchuk advising him that he and Sweborg would be at lunch. (Record Vol. 5 at 380-381.)

Staub and Sweborg have a major disconnect on this point. Staub testified that the two of them were together from the time he reported to work until they went to lunch. (Record Vol. 5 at 382.) Yet Sweborg, called as a witness by Staub, testified on direct examination:

> Q. After you finished your cases and went to lunch, did you guys contact Mike Korenchuk?
>
> A. No.
>
> Q. Why not?
>
> A. I guess it didn't occur to us. It was a late lunch. We felt that there was time for us to go to lunch and we still had other duties when we

> came back to complete before the end of the day too.

(Record Vol. 5 at 268.) Sweborg's testimony corroborates Korenchuk's report to Buck.

Notably, Staub's voicemail defense was raised for the first time at trial. Neither of his post discharge grievances make any reference to having left a voicemail for Korenchuk. (P. Ex. 28, Record Vol. 3 at 59-63; Offered at Record Vol. 5 at 86; Admitted at Record Vol. 5 at 162; P. Ex. 27, Record Vol. 3 at 53-58; Offered at Record Vol. 5 at 386; Admitted at Record Vol. 5 at 395.)

Assuming every word of Staub's story is true, it does not prove that Korenchuk fabricated a falsehood and fed it to Buck. The charge contained in the Corrective Action was that Staub "will remain in the general diagnostics area unless he specifies to Mike or Jan where and why he will go elsewhere". Staub admits he did not speak to Korenchuk and there is no testimony that he made any effort to seek out Mulally. (Record Vol. 5 at 381.) There was no evidence presented to the jury that Korenchuk was aware of any voicemail from Staub.

Again, the link just is not there. Two statements made six years prior to termination do not make it; a report based on facts as confirmed by Leslie Sweborg does not make it. There is no evidence to demonstrate that Korenchuk -- the man who was "very supportive" of Staub, showed him "complete

compassion," and was "truly an asset to the U.S. Army Reserve and all of the principals we stand for" -- harbored any animus toward Staub on account of his service, much less that such animus motivated Buck's termination decision. Therefore, evidence of that animus should not have been presented to the jury.

IV. BUCK'S INDEPENDENT DECISION BROKE ANY CAUSAL CONNECTION BETWEEN THE ANIMUS STAUB ATTRIBUTES TO MULALLY AND KORENCHUK AND HIS TERMINATION.

The federal courts of appeal are in agreement that where a final decision maker makes an independent decision based on an independent review of information, the causal link between a non-decision maker's alleged bias and the employment decision is broken, and the non-decision maker's animus is insufficient to impute liability to the employer (i.e. is not the proximate cause of the employment decision). *See, e.g., Thompson v. Coca-Cola Co.*, 522 F.3d 168, 179 (1st Cir. 2008) (no causal connection where "the Separation Review Committee made its own independent decision to terminate Thompson based on the facts of the situation"); *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002) (no causal link between alleged bias of Collins' supervisors and his termination by Transit Authority Board, where Board made decision following evidentiary hearing); *King v. Rumsfeld*, 328 F.3d 145, 153 (4th Cir. 2003) (ruling that evidence of subordinate's bias was irrelevant because decision maker terminated King

"after conducting his own independent investigation"); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) (if decision maker based decisions on his own independent investigation, causal link between alleged retaliatory intent and terminations would be broken); *Wilson*, 952 F.2d at 946 (6th Cir. 1992) (finding that animus of Wilson's supervisor was not imputed to employer because decision was based on independent review); *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 919-20 (7th Cir. 2007) (ruling that decision maker conducted independent investigation that absolved employer of liability for any deception on the part of Brewer's supervisor); *Richardson*, 448 F.3d at 1060 (8th Cir. 2006) (animus of athletic director not imputed to employer where decision maker conducted independent review of recommendation to terminate Richardson, and decision maker's own impression of facts provided an independent basis for his decision to approve termination); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641, n.9 (9th Cir. 2004) (stating that "no nexus exists when the decision maker makes an independent and legitimate decision to discipline the plaintiff."); *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001) (ruling that decision maker's attempt to balance allegedly biased investigators' findings with English's own version of events "cuts off any alleged bias on the part of the investigators from the chain of events leading to English's termination"); *Stimpson*, 186 F.3d. at 1330 (11th Cir. 1999) (finding that independent decision severed causal link between animus and termination decision).

Staub received the benefit of Buck's independent review of the facts giving rise to his discharge not once but twice. The first time was when she made the decision. The second time was when Staub filed his post-discharge grievance with Buck. In both instances, Buck acted upon information she obtained from sources having no animus toward Staub. In the second instance, she carefully reviewed his written grievance, weighed his arguments, and made an independent decision to affirm her discharge decision. Buck's actions broke any causal connection between the animus Staub attributes to Mulally and Korenchuk and her decision to fire him.

A. Buck Independently Decided To Terminate Staub.

The undisputed facts in this case show that Buck had a negative impression of Staub as an employee, independent of any input from Mulally or Korenchuk, long before she decided to terminate his employment. Buck had received and considered information regarding Staub absenting himself from the Diagnostic Imaging Department and failing to follow directives from various, unbiased sources.

During the April 2, 2004 meeting, Angie Day informed Buck that Staub would absent himself from the Diagnostic Imaging Department and that he was not helpful, hard to work with, and abrupt. (Record

Vol. 5 at 73-74, 100.) There was no evidence admitted at trial that Day possessed any military animus.[10]

Garret McGowan, Proctor's Chief Operating Officer, expressed similar concerns about Staub's

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[10] There was no evidence presented to the jury that Day bore animus toward Staub on account of his service in the Reserve. However, the Government, at page 4 of its *amicus* brief, states:

> In the past, Day had complained about having to work outside of her ordinary scheduled hours when petitioner was away on military duty. *Id.* at 44a.

The citation is to the magistrate judge's pretrial ruling on a motion in limine. "In considering whether sufficient evidence was presented to a jury to support a verdict, a court may not consider evidence not before the jury." *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 612-13 (6th Cir. 1999). The Petitioner similarly makes gratuitous references to matters outside of the trial transcript. For example, at page six the Petitioner states:

> [Mulally's] actions "had the effect of breeding resentment and animosity toward Staub among his co-workers." (JA 106a-07a; see JA 95a).

Once again, the citations are to the district judge's pretrial ruling on summary judgment (JA 106a-07a) as well as the magistrate judge's pretrial ruling on motions in limine (JA 95a) and not to any testimony or exhibits presented to the jury. The Petitioner's statement of the case contains five other instances of citations, not to the trial record, but to pre-trial rulings. "We do not sit to reweigh evidence based on information not presented at trial." *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 155 n.15 (2003).

behavior. McGowan stated to Buck at the April 2, 2004 meeting that he previously had received the same complaints about Staub that Day had made -- Staub would absent himself from the Diagnostic Imaging Department and he was not helpful, hard to work with, and abrupt. (Record Vol. 5 at 101.) As a result, McGowan directed Buck and Korenchuk to come up with a plan to address Staub's behavior. (Record Vol. 5 at 101, 541.)

Buck's review and consideration of Staub's personnel file provided her with numerous examples of Staub absenting himself from the Diagnostic Imaging Department and failing to follow documented directives. (Record Vol. 5 at 85, 103.)[11] That included

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[11] At page 12, Petitioner's Brief states:

> Buck stated that she reviewed Staub's personnel file only after the decision to dismiss Staub had been made.

That statement is inconsistent with her testimony

> Q. Even though your termination notice just relates to the warning and the failure to follow the directive afterwards, you contend now that you reviewed Vince's personnel file before you decided to terminate; is that correct?
>
> A. I did review his file before he was terminated. I reviewed the file as it stood in human resources.

(continued...)

Staub's termination in 1998 for failure to follow an order, as well as his reinstatement with conditions such as "You will communicate with your supervisor whenever you are leaving the work area." (D. Ex. 2, Record Vol. 3 at 141; Offered at Record Vol. 5 at 149; Admitted at Record Vol. 5 at 396.) Staub's January 2002 evaluation wherein he was given a "0" or unsatisfactory for attitude advised him to: "Focus more on tasks, less on socializing. Be more of a team player in terms of accessibility/productivity. Stay in the department during paid working hours." (D. Ex. 18, Record Vol. 3 at 165; Offered at Record Vol. 5 at 428; Admitted at Record Vol. 5 at 451.) Staub's December 2003 evaluation counseled him to: "be aggressive in his attempt to work throughout the Dept." and "not to go on the defensive when questioned. Angio at Proctor is also a part of diagnostics and work needs to be in both areas." (P. Ex. 32, Record Vol. 3 at 135; Offered at Record Vol. 5 at 132; Admitted at Record Vol. 5 at 162.)

Additionally, Buck received information from Brenda Carothers, Proctor's Director of Human Resources, pertaining to the events described in the January 2004 Corrective Action. Carothers recommended the issuance of the Corrective Action following her review of the allegations against Staub. She subsequently met with him to hear his further protests. (Record Vol. 5 at 80, 368-370.) There is no

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[11](...continued)
(Record Vol. 5 at 85.)

evidence in the record that Carothers was biased against Staub.

Thus, when Buck made the decision to terminate Staub on April 20, 2004, she was aware from a number of sources that Staub had a history of absenting himself from the Department and failing to follow directives, and was independently able to decide that Staub should be terminated.[12] This is not a case where Mulally or Korenchuk shaped or directed the scope of Buck's review and determination, such that the review and determination were not truly independent (*see, e.g., Poland*, 494 F.3d at 1183 (finding no independent review and decision where the biased non-decision makers directed and manipulated the scope of the decision maker's investigation by being the primary source of the allegations against the plaintiff and by selecting all of the witnesses to contact)), nor is it a case where Buck considered only Staub's personnel file for her independent review and determination (*see, e.g., BCI Coca-Cola Bottling Co.*, 450 F.3d at 492-93 (finding no independent review and

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[12] Buck previously terminated at least one other employee for the same reason she decided to terminate Staub, and that employee was not a member of the military. That employee was a computer operator who often absented himself from his department, just like Staub, and was given a written warning, just like Staub. The employee was subsequently terminated by Buck after being absent again from his department, just like Staub. (Record Vol. 5 at 525-527.) This evidence is sufficient to show that Proctor would have fired Staub regardless of his Reserve status. *See, e.g., Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 314 (4th Cir. 2001).

determination where the decision maker relied exclusively on information from a biased individual, and the decision maker's review consisted of exactly one action -- reviewing the plaintiff's personnel file)). Because Buck's review and determination were truly independent, any information provided by Mulally and Korenchuk was not the proximate cause of Staub's termination, and the alleged discriminatory animus of Mulally and Korenchuk cannot be imputed to Proctor. *See, e.g., Richardson*, 448 F.3d at 1060; *Young v. Dillon Cos., Inc.*, 468 F.3d 1243, 1253 (10th Cir. 2006); *Brewer*, 479 F.3d at 921 (all refusing to impute the animus of a non-decision maker to the employment decision where the decision maker engaged in an independent review or investigation).

> In this case, any claim that Broyles used White and/or Sugg as a "cat's paw" to advance any animus he might have held fails. Richardson's contract provided for independent review by Sugg of any decision to fire Richardson, which review was amply undertaken, and Sugg's own impression of Richardson's comments at the press conference provided an independent basis for his decision to approve Richardson's termination.

Richardson, 448 F.3d at 1060.

> While Branham met with Bauman to discuss the member complaints that Payroll had received, Branham did not

> control all of the information that Bauman had to evaluate the recommendation to terminate Long. The set of data available to Bauman consisted of information provided by Branham, Sherman and Larkin. Nothing in the record suggests that Branham exerted singular influence over Bauman's decision or that Bauman merely "rubber-stamped" Branham's recommendation; to the contrary, the undisputed facts show that Bauman reviewed multiple sources of information on his own, held at least three meetings and received Larkin's independent recommendation before deciding to fire Long.

Long v. Teachers' Ret. Sys., 585 F.3d 344, 352 (7th Cir. 2009).

Moreover, during his termination meeting, Buck considered Staub's version of the events giving rise to his discharge. On April 20, 2004, when Staub was shown the termination notice and Korenchuk explained to him that he could not find him and he was not where he was supposed to be, Staub protested and gave his explanation of his whereabouts. Buck listened to Staub's explanation. (Record Vol. 5 at 384-386.)

B. Buck Independently Decided To Deny Staub's Post-Discharge Grievance.

On April 25, 2004, Staub filed a written grievance with Buck protesting his termination. The grievance laid out in detail his version of events regarding: (1) the January 27, 2004 Corrective Action; (2) his actions with regard to assisting non-invasive Diagnostic Imaging following the Corrective Action; (3) complaints against Mulally pertaining to scheduling; (4) comments made by Day related to covering Staub's drill duty dates; (5) statements made by Korenchuk related to Staub's drill dates, scheduling, and possible deployment; and (6) Mulally's telephone calls to Joseph Abbidinni, a civilian worker for the Army Reserve Center in Bartonville, where Staub had been stationed. (Record Vol. 5 at 104, 386; P. Ex. 28, Record Vol. 3 at 59-63; Offered at Record Vol. 5 at 86; Admitted at Record Vol. 5 at 162.)

Buck reviewed Staub's grievance, considered Staub's version of events, and investigated his claim that the January 27, 2004 discipline was false. She testified under cross examination:

> Q. As far as Vince's grievance, did you undertake any investigation as to his claims about Jan Mulally?
>
> A. Which claims would those be?

> Q. The claims that the January 27th write-up was false.
>
> A. Yes, I did. I brought it up with the director of human resources who was involved in corrective action.

(Record Vol. 5 at 88.) Ultimately, Buck determined that the termination decision should stand. Buck gave Staub the opportunity to present his side of the story. (Record Vol. 5 at 104, 384-386.) This fact alone establishes that Buck made an independent decision to terminate Staub. *See, e.g., Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547-48 (7th Cir. 1997); *English*, 248 F.3d at 1011; *Thompson*, 522 F.3d at 178; *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1061 (10th Cir. 2009).

> Even if some of the witnesses who testified before the ABI had a hidden agenda, that alone is not sufficient to compel a finding that the agenda caused the adverse action. Where the employer's decision maker tries to get all sides of the story, the employer will not be held liable solely because one side might harbor a hidden bias against the plaintiff employee. As the Tenth Circuit explained, "Simply asking an employee for his version of events may defeat the inference that an employment decision was ... discriminatory."

* * *

> Typically, it will only be with the benefit of 20/20 hindsight that the animosity will become clear. As long as the decision maker seeks input from all sides of the dispute (most importantly from the targeted employee) and as long as the decision maker does not permit a subordinate's biased view to become the overriding influence, then the resulting decision will be an independent one.

Roberts v. Principi, No. 06-6059, 2008 WL 2521094, at *9 (6th Cir. June 25, 2008) (internal citations omitted).

> It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source. For instance, we have frequently dealt with employees that claim they were framed for misconduct by a racist coworker or superior, which caused the employee in question to be fired. Even though the employer in such situations must often decide what to do based on nothing more than the conflicting stories of two different employees, the employer will not be liable for the racism of the

> alleged frame-up artist so long as it independently considers both stories.

Brewer, 479 F.3d at 918.

The fact that Buck made the original termination decision before receiving Staub's side of the story is immaterial. It is undisputed that Buck considered Staub's version of events at the time of his termination and as part of the grievance process, and that Buck could have elected to rescind Staub's termination and reinstate him.[13] An independent, post-termination review of a termination decision removes the taint of any bias in the decision-making process. *See, e.g., Metzger v. Ill. State Police*, 519 F.3d 677, 682-83 (7th Cir. 2008) (holding reconsideration of adverse decision arguably influenced by retaliatory animus was sufficient); *Richardson*, 448 F.3d at 1060 (holding subsequent review of discharge decision arguably influenced by racial animus was sufficient).

Even if Mulally or Korenchuk possessed military animus and provided information considered by decision maker Buck, her independent review and determination broke any causal link between Mulally's

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[13] Staub was fully aware that the Hospital's grievance procedure could work in his favor as it did in 1998 when he was discharged the first time, filed a grievance, and was conditionally reinstated to employment with the Hospital. (Record Vol. 5 at 149-151; D. Ex. 2, Record Vol. 3 at 141; Offered at Record Vol. 5 at 149; Admitted at Record Vol. 5 at 396.)

and Korenchuk's military animus and Staub's termination.

> [A] plaintiff must show that the allegedly biased investigator's discriminatory reports, recommendation, or other actions *were the proximate cause* of the adverse employment action. Thus, we have held that an unbiased supervisor can break the causal chain by conducting an "independent investigation" of the allegations against an employee.

Young, 468 F.3d at 1253 (internal citations omitted) (emphasis added).

> However, when a decision maker makes a decision based on an independent investigation, any causal link between the subordinate's retaliatory animosity and the adverse action is severed.

Roberts, 2008 WL 2521094, at *8.

Simply put, Buck based her termination decision on her own independent review of the situation. Ultimately, she independently determined that Staub had a history of both absenting himself from the Diagnostic Imaging Department and failing to follow directives. At no time did Staub's military status enter into Buck's termination decision. Buck's independent review broke any causal link between Mulally's and Korenchuk's alleged military animus

and Staub's termination and, therefore, any such animus was not the proximate cause of Staub's termination.

> [T]he evidence established that Buck looked beyond what Mulally and Korenchuk said – remember, Korenchuk supported the firing only "reluctantly" – and determined that Staub was a liability to the company. . . Viewing the evidence reasonably, it simply cannot be said that Buck did anything other than exercise her independent judgment, following a reasonable review of the facts, and simply decide that Staub was not a team player.

J.A. 50a-51a.

V. PROCTOR CANNOT BE VICARIOUSLY LIABLE FOR BUCK'S DECISION.

"This Court has recognized that 'when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.' *Meyer v. Holley*, 537 U.S. 280, 285 (2003)." Br. of the United States at p. 11-12. "Since a damages action for a violation of a federal anti-discrimination statute 'sounds basically in tort,' such an action is governed by general agency principles." *Id.*; *see also* Br. of the Pet'r at p. 20-21, 36-37.

USERRA, unlike most federal anti-discrimination laws, provides for the personal liability of a decision maker whose animus causes the injury that is the subject of the complaint. USERRA does so by defining "employer" to include "a person . . . to whom the employer has delegated the performance of employment-related responsibilities". 38 U.S.C. § 4303(4)(A)(i). Because the decision maker can be personally liable, USERRA is uniquely suited to resolving the issue before the Court.

The only adverse action Staub complained of in this case was his termination (i.e. the denial of retention of employment) in violation of 38 U.S.C. § 4311(a). (Record Vol. 3 at 242.) Linda Buck undisputedly was the person who made the decision to discharge Staub. Buck unquestionably bore no animus toward Staub on account of his service in the Reserve. Had Buck been named a defendant in this action, the case against her would not have made it to a jury. Applying "the ordinary tort-related vicarious liability rules", if Buck as Proctor's agent cannot be held liable, Proctor cannot be held liable either.

As this Court has noted:

> It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity.

* * *

> [H]ere the defense is that the act of the conductor was lawful. If the immediate actor is free from responsibility because his act was lawful, can his employer -- one taking no direct part in the transaction -- be held responsible? ... The question carries its own answer; and it may be generally affirmed that, if an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therfor.

New Orleans & No. R.R. Co. v. Jopes, 142 U.S. 18, 24, 27 (1891).

The courts of appeal have recognized as much as well:

> [W]hen *respondeat superior* is the sole asserted basis of liability against a master for the tort of his servant an adjudication on the merits in favor of either the master or servant precludes suit against the other. The rule developed as an offshoot of the doctrine of *res judicata*. Although a master and his servant are not technically in privity, the preclusive principles underlying *res judicata* were thought to have equal application in the *respondeat superior* setting because the operative facts and

> law controlling a servant's direct liability are always identical to those that determine the vicarious liability of his master (so long as the agency relationship and its scope are not in dispute). If the master is vicariously liable, the servant must be directly liable (and vice versa); if the master is not vicariously liable, the servant cannot be directly liable (and vice versa).

Muhammad v. Oliver, 547 F.3d 874, 879 (7th Cir. 2008); *see also Crawford v. Signet Bank*, 179 F.3d 926, 929 (D.C. Cir. 1999) ("In the absence of agent liability, therefore, none can attach to the principal"); *Lober v. Moore*, 417 F.2d 714, 717-18 (D.C. Cir. 1969) ("a judgment exonerating a servant or agent from liability bars a subsequent suit on the same cause of action against the master or principal based solely on respondeat superior"); *Carroll v. Hubay*, 272 F.2d 767, 769 (2d Cir. 1959) (favorably quoting the Restatement of Judgments § 106(g) for its statement that "Where an action is brought against a master and a servant based wholly upon the negligence of the servant, a judgment against the master should be set aside, if judgment is given for the servant").

This underlying premise applies equally whether the relationship is described as master/servant or principal/agent. In discussing the dual application, the Tenth Circuit explained:

> While reference here is made only to the relation of master and servant, it also pertains to the relation of principal and agent. In either instance, the liability is grounded upon the doctrine of respondeat superior. It has been held that under that doctrine the liability of the master to a third person for injuries inflicted by a servant in the course of his employment and within the scope of his authority, is derivative and secondary, while that of the servant is primary, and absent any delict of the master other than through the servant, the exoneration of the servant removes the foundation upon which to impute negligence to the master.

Simpson v. Townsley, 283 F.2d 743, 746-47 (10th Cir. 1960), quoting *Jacobson v. Parrill*, 351 P.2d 194, 199 (Kan. 1960). In discussing the liability of a defendant in a second action where the liability is necessarily dependent upon the culpability of the agent defendant in the first action, the court in *Willoughby v. Flem*, 158 F. Supp. 258 (D. Mont. 1958), articulated a similar overview and explanation:

> The rule here applicable is well stated by Corpus Juris Secundum as follows:
>
> > "...if the liability of a person sued for tort is necessarily dependent on the

> culpability of another, who was the immediate actor and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, defendant may set up such judgment as a bar." 50 C.J.S. Judgments § 760c, p. 286.

In the case of *Barraber v. Crescenta Mutual Water Company*, 1948, 88 Cal. App. 2d 192, 198 P.2d 558, 560, the court said:

> "Generally the principle of res judicata applies only between parties to the original judgment or their privies. But in a tort action lack of privity in the former action does not prevent an estoppel where defendant's liability is predicated upon the culpability of another who was the immediate actor and who was exonerated in an action against him by the same plaintiff for the same act. The situation is analogous

> to that of principal and agent."

Willoughby v. Flem, 158 F. Supp. at 260-61; *see also Portland Gold Mining Co. v. Stratton's Independence, Ltd.*, 158 F. 63, 65-68 (8th Cir. 1907) (same); *Preis v. Lexington Ins. Co.*, 508 F. Supp. 2d 1061, 1078 (S.D. Ala. 2007) ("Without a viable claim against the agent, there can be no recovery against the principal under the respondeat superior theory"); *Black v. District of Columbia*, 480 F. Supp. 2d 136, 141 (D.D.C. 2007) (vicarious liability claims "must be predicated upon tortious acts by employees"); *Hayes v. Chartered Health Plan*, 360 F. Supp. 2d 84, 90 (D.D.C. 2004) ("In the absence of agent liability, no liability can attach to the principal").

Again, it is undisputed that Linda Buck harbored no military animus. Thus, Buck committed no wrongful act in discharging Staub. Because there is no underlying wrong, there is nothing for which to hold Proctor, as the employer principal, liable. *See Garcia v. Arribas*, 363 F. Supp. 2d 1309, 1317 (D. Kan. 2005) ("When an employee is not negligent, there is obviously no basis to hold his employer derivatively liable"); *Collins v. Schweitzer, Inc.*, 774 F. Supp. 1253, 1264 (D. Idaho 1991) (where "the foundation of the action is still negligence, or other fault, on the part of the agent ...if the agent is found to be not negligent, then the principal cannot be held vicariously liable to the plaintiff because there is no negligence for which to be held vicariously liable"); *Soraghan v. Henlopen Acres, Inc.*, 236 F. Supp. 489, 490 (D. Del. 1964) ("any

liability of the principal is extinguished by reason of the acquittal of the wrongdoer. There being no cause of action existing in the first place, neither principal or agent could be liable").

Applying "ordinary tort-related vicarious liability rules", the analysis of Staub's case against Proctor would end here.[14]

> Under the normal discrimination framework, that would have been the end of the road for Brewer's case. But we held that his claim could survive if he showed Thompson used Hendricks as her cat's paw.

J.A. 43a. The Seventh Circuit, rather than restricting the rights of a plaintiff by a literal application of "general agency principles", actually expands upon them by applying the cat's paw analysis. The cat's

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[14] In his Amended Complaint, Staub alleged that the January 27, 2004 Corrective Action, the April 20 report, and his termination all constituted pretexts for discrimination under Section 4311 of USERRA. However, at trial Staub only advanced to the jury the argument that his *termination* constituted discrimination in violation of USERRA. (Record Vol. 3 at 242.) As a result, Staub has waived any claim that the January 27, 2004 Corrective Action and the April 20 report independently constitute actionable adverse actions in violation of Section 4311 of USERRA. *See, e.g., Melford Olsen Honey, Inc. v. Adee*, 452 F.3d 956, 966 (8th Cir. 2006) (ruling that party waived a claim by failing to request a jury instruction on the claim); *U.S. v. Burlington N., Inc.*, 500 F.2d 637, 640-41 (9th Cir. 1974) (same).

paw gives Staub, and all plaintiffs who have no evidence of animus on the part of the employer's agent who made the adverse decision, a second bite at the apple. The Seventh Circuit posits that if Buck was not the real decision maker, but merely a dupe in a diabolically clever scheme to procure Staub's discharge for a proscribed purpose, Proctor might still be vicariously liable because in that situation Buck's decision is actually the decision of someone else. But after examining the trial record, the Seventh Circuit found, as explained in detail above, that this case was so lacking in evidence of that nature that it should never have been presented to a jury for consideration.

Neither Staub nor the Government faults the Seventh Circuit for applying the cat's paw analysis to increase employer exposure under traditional vicarious liability rules. Rather, they argue for a further erosion of those rules. "To prevent the cat's paw theory from spiraling out of control" the Seventh Circuit derived a simple formula:

> We were, and remain to this day, unprepared to find an employer liable based on a non-decision-maker's animus unless the "decision maker" herself held that title only nominally. If the decision maker wasn't used as a cat's paw–if she didn't just take the monkey's word for it, as it were–then of course the theory is not in play.

J.A. 45a. Staub and the Government rail against this part of the Seventh Circuit's ruling while embracing the portion that favors the plaintiff by enhancing employer liability.[15] They can cite to no established agency law principle which would require the Court to overrule it.

The Seventh Circuit's application of the cat's paw has much to recommend it. It relieves a plaintiff who has been the victim of a well orchestrated but concealed plan to discriminate against him from the strict application of ordinary rules of agency and vicarious liability which might otherwise produce a harsh result. It encourages employers to engage in independent decision making with respect to adverse employment actions. Independent reviews and decisions by unbiased decision makers promote the salutary purpose of USERRA by ensuring that the discriminatory bias of an employee does not proximately cause an actionable adverse employment decision. It provides the trial courts with a workable standard by which to assess liability. *See Norfolk*, 538 U.S. at 176 (noting that "it is for the Court to develop and administer a fair and workable rule of decision").

---

[15] Staub did not argue against the cat's paw instruction in the trial court. He advocated its use because failure to do so would have terminated his case. If Staub had candidly urged the trial court to grant him the relief he seeks in this Court (i.e. a ruling that evidence of animus from any source is sufficient to present the case to a jury for decision) he would have been the recipient of a judgment as a matter of law.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

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REPLY BRIEF

Supreme Court, U.S.
FILED
SEP 30 2010
OFFICE OF THE CLERK

09-400

IN THE

Supreme Court of the United States

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I. PROCTOR IS LEGALLY RESPONSIBLE FOR THE INJURY TO STAUB CAUSED BY PROCTOR'S AGENTS MULALLY AND KORENCHUK

(1) Correctly noting that Buck would not have been personally liable under the circumstances of this case, Proctor insists it necessarily follows that Proctor itself must be immune from liability. Respondent relies on the agency rule that a principal can only be held liable for the tort of an agent if the agent herself actually committed a tort. (R.Br. 54-60). "[I]f Buck as Proctor's agent cannot be held liable, Proctor cannot be held liable either." (R.Br. 54).

But Buck is not the only agent of Proctor at issue in this case. Mulally and Korenchuk are the company officials whose unlawful motive led to Staub's dismissal, and Proctor does not deny that Mulally and Korenchuk were acting as its agents when they engaged in the conduct that led, as they doubtless intended, to Staub's termination.

Where a tort is the result of the interrelated actions of several agents, the liability of the principal does not require a showing that *all* of the agents committed a tort. For example, if a medical technician negligently mislabeled a vial of medicine, and a nurse as a consequence later administered the wrong medicine to a patient, the injured patient could sue the hospital even though only the technician—and not the nurse who was most immediately responsible for administering the medicine—would be culpable. Similarly, if a mechanic employed by the hospital negligently repaired the

brakes on an ambulance, and an ambulance driver subsequently had an accident because the brakes failed, the hospital would be liable even though the driver herself had not engaged in tortious behavior.

The decisions on which respondent relies do not hold otherwise. Rather, those decisions address the distinct situation in which only a single agent was involved in the events leading to the harm complained of. E.g., *New Orleans & N.E.R.Co. v. Jopes*, 142 U.S. 18 (1891)(knife-wielding passenger shot by conductor in self-defense). In that category of cases "the operative facts . . . controlling a servant's direct liability are always identical to those that determine the vicarious liability of his master." (R.Br. 56)(*quoting Muhammad v. Oliver*, 547 F. 3d 874, 897 (7th Cir. 2008)).[1] But in the instant case the operative facts controlling Buck's liability (her own actions and motives) are not identical to the facts bearing on Proctor's liability (which also include the actions and motives of Korenchuk and Mulally).

Respondent relies on section 106(g) in the Restatement of Judgments, which recognizes that

> where an action is brought against a master and a servant based wholly upon the negligence of the servant, a judgment against the master should be set aside if judgment is given for the servant.

1. See *Preis v. Lexington Ins. Co.*, 508 F.Supp. 2d 1061, 1078 (S.D.Ala. 2007)("if all tort claims against an agent are dismissed with prejudice, then a subsequent tort claim *based on the same facts* will not lie against the agent's principal")(emphasis added)(*quoting Hundley v. J.F.Spann Timber, Inc.*, 962 So. 2d 187, 193-94 (Ala. 2007))(cited at R.Br. 59).

(R.Br. 56)(*quoting Carroll v. Hubay*, 272 F. 2d 767, 769 (2d Cir. 1959)(*quoting* Restatement)). The instant action, however, is not "based wholly upon" the actions and motives of Buck; rather, it rests largely on the actions and motives of Mulally and Korenchuk, which caused Buck in turn to dismiss Staub. Thus the fact that Buck individually would not have been liable does not mean, as Proctor argues, that "there is no underlying wrong." (R.Br. 59).

Although USERRA in some cases[2] imposes liability on officials as well as on their employers, that does not limit the circumstances in which employers themselves would otherwise be liable. An employer could be liable under USERRA even if, because of the limitations on individual liability under the statute, no individual official were personally liable.[3] The manifest purpose of

---

2. In the case of federal employees, USERRA appears to authorize judicial relief only against the agency itself, not against federal officials who may have violated the statute. See 38 U.S.C. § 4324(d)(1)(authorizing judicial review of final decision of the Merit Systems Protection Board); cf. 38 U.S.C. § 4324(c)(2)(Board may "requir[e] the agency or Office [of Personnel Management] to . . . compensat[e a complainant] for any loss of wages or benefits.").

The lower courts are divided regarding whether USERRA authorizes relief against officials of state or local government bodies. *Compare Townsend v. University of Alaska*, 543 F. 3d 478, 485-86 (9th Cir. 2006)(no individual liability) *with Risner v. Ohio v. Dept. of Rehabilitation and Correction*, 577 F.Supp. 2d 953, 966-67 (N.D.Ohio 2008)(individual liability).

3. In the instant case Proctor does not contend that individual liability could not be imposed in this case on Mulally or Korenchuk.

the authorization (in some but not all circumstances) of individual liability under USERRA is to enhance the deterrent effect of the statute; that deterrent purpose would obviously be defeated if, as Proctor argues, a biased official (such as Mulally) could immunize both herself and her employer from claims under USERRA simply by laundering her unlawful purpose through an intermediary (such as Buck).

(2) This Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), confirm the applicability of agency law principles to employment claims. Both *Faragher* and *Ellerth* held that an employer is liable for unlawful actions taken by an employee acting within the scope of his employment. *Faragher*, 524 U.S. at 793; *Ellerth*, 524 U.S. at 755-56. The plaintiffs in those cases could not establish that the officials at issue were acting in the scope of their employment because the discrimination at issue was sexual harassment; the Court noted that sexual harassment ordinarily neither is among the types of duties assigned to supervisors nor is engaged in with an intent to advance the interests of the employer. *Faragher*, 524 U.S. at 793-801; *Ellerth*, 524 U.S. at 756-57. In the instant case however, as in at least most dismissal cases, both of those factors were present.

The plaintiffs in *Faragher* and *Ellerth* also invoked the agency principle that an employer is liable for torts of an employee if the employee was "aided in" committing that tort by his official position. The "aided in" principle, this Court concluded, was not squarely applicable to sexual harassment, because a harassing

supervisor was only aided "in a sense" by his position. *Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 760. It was only after reaching that conclusion that the Court fashioned the special liability rule in *Faragher* and *Ellerth*. In the instant case, on the other hand, the supervisory positions held by Korenchuk and Mulally clearly aided them in their efforts to get rid of Staub. "[O]nly a supervisor, or other person acting with the authority of the company," could have engineered Staub's dismissal in the manner in which Mulally and Korenchuk did. *Ellerth*, 524 U.S. at 762.

The liability rule in *Faragher* and *Ellerth* was based in particular on the Court's earlier decision that sexual harassment is an unusual type of discrimination which should not invariably result in employer liability. *Faragher*, 524 U.S. at 803. On the other hand, as the Court noted in both *Faragher* and *Ellerth*, employers have invariably been held liable for discrimination in "hiring, firing, promotion, compensation, and work assignments." *Faragher*, 524 U.S. at 790; *Ellerth*, 524 U.S. at 761. This is that case.

II. USERRA DOES NOT RECOGNIZE ANY OF THE NEW DEFENSES PROPOSED BY RESPONDENT

An employer is liable for harms caused by its employees when acting within the scope of their employment. Respondeat superior "is a form of strict liability." Prosser and Keeton on The Law of Torts, § 69, p. 499 (5th ed. 1984). What Proctor wants, and what the Seventh Circuit fashioned, is a special exception to this rule for employment discrimination cases. The Seventh Circuit has acknowledged that its cat's paw

doctrine, to the extent that it requires a plaintiff to show more than that a biased supervisor caused the adverse employment action at issue, is "inconsistent with the normal analysis of causal issues in tort litigation." *Lust v. Sealy, Inc.*, 383 F. 3d 580, 584 (7th Cir. 2004).

Respondent urges the Court to create seven new defenses unknown to tort or agency law. Where the discriminatory conduct of a biased supervisor causes adverse action against a plaintiff, respondent argues, an employer should be immune from liability if it shows that either (1) the ultimate decisionmaker made an "independent review" of a decision by a biased supervisor[4], (2) the ultimate decisionmaker made an "independent decision," even though that decision was based on information from a biased supervisor[5], (3) the ultimate decisionmaker conducted an "independent investigation," even though that decisionmaker still relied on information from or the recommendation of a biased supervisor[6], (4) the ultimate decisionmaker invited the plaintiff to make a statement before the adverse action was taken[7], (5) the plaintiff actually made some sort of statement before the adverse action was taken[8], (6) a company official considered a grievance submitted by the plaintiff following the adverse action[9]

4. R.Br. 13, 14, 39, 40, 45, 46, 48, 49, 52.

5. R.Br. 13, 39, 40, 41, 45, 46, 51, 52, 62.

6. R.Br. 14-5, 39, 40, 46, 48, 51.

7. R.Br. 49, 50.

8. R.Br. 8, 13, 47, 51.

9. R.Br. 51.

or (7) the ultimate decisionmaker, although relying on information from or a recommendation by a biased supervisor, was not so inept as to be a mere "pawn" or "dupe".[10]

Amicus briefs submitted in support of respondent urge the Court to create several other new defenses to USERRA (and other employment-related) claims. Under these proposals an employer could escape liability for a dismissal caused by a biased supervisor if either (1) the ultimate decisionmaker, although relying completely on information from a biased supervisor, was acting in furtherance of health and safety concerns[11], (2) the ultimate decisionmaker acted "responsibly,"[12] (3) the biased supervisor, even though the sole source of the information relied on by the ultimate decisionmaker, did not "advocate" for a particular course of action against the plaintiff[13], or (4) the discrimination victim did not first complain to the employer before filing suit.[14]

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10. R.Br. 13, 14, 61. Under this proposed defense an employer could avoid liability by showing that the machinations of the biased supervisor fell short of being a "diabolically clever scheme." (R.Br. 62).

11. Brief of the National Federation of Independent Business Small Business Legal Center as *Amicus Curiae* In Support of Respondent, 23-25.

12. Brief of Chamber of Commerce of the United States of America as *Amicus Curiae* In Support of Respondent, 6, 7, 26, 28, 29, 33.

13. *Id.* at 25-27.

14. Brief for the National School Boards Association as *Amicus Curiae* Supporting Respondent, 28-34.

The amici candidly acknowledge that these various affirmative defenses would apply to a large portion of all employment cases arising under federal law; important employment decisions such as dismissals, they explain, are frequently made by officials who rely on information or recommendations from other supervisors.[15]

Every one of these proposed new defenses has the same fatal flaw: none of them has any basis in the terms

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15. Brief *Amicus Curiae* of The Equal Employment Advisory Council in Support of Respondent, 24-25 ("Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings to a more senior manager who may work in a different city or state. Often, the individual making the employment decision is not the same person who conducted the initial investigation."); Brief of the National Federation of Independent Business Small Business Legal Center as *Amicus Curiae* in Support of Respondent, 2 ("small business owners often rely on many people in the chain of command when making employment decisions"), 8 ("information always flows up the chain of command to decisionmakers"), 16 ("the decisionmakers in employment settings often do not have direct supervisory authority over the affected employee. That falls to the supervisors that are put in place to relay information up the chain of command"); Brief for the National School Boards Association as *Amicus Curiae* Supporting Respondent, 7 ("typically the [school] superintendent relies on assistant superintendents, area directors, principals, other supervisors and human resource employees to . . . recommend employees for . . . termination. In fact, most school boards have no role in evaluating employees . . . or developing recommendations for . . . discipline, or termination. Instead, school boards rely on input from administrators to inform their . . . firing decisions. . . . [S]chool boards generally will rely only on the recommendations and the facts as presented by an administrator when deciding to terminate.").

of USERRA, and all are inconsistent with the provisions of section 4311(c). Under that provision, once a plaintiff demonstrates that an impermissible purpose was a factor in the employer's action, the employer "shall be considered to have engaged in actions prohibited," subject to only a single statutory defense. The employer can avoid liability solely by proving "that the action [complained of] would have been taken in the absence of such membership [in the armed forces.]" Judicial adoption of any of the proposed new defenses would be inconsistent with the statutory language mandating a finding of liability if the single *statutory* defense is not established.

If, as respondent urges, a discrimination claim could be defeated by proof that the ultimate decisionmaker relied in part on evidence from some other source, a plaintiff would in effect be required to prove that tainted information from that biased supervisor was the *sole* factor relied on by the ultimate decisionmaker. Section 4311(c)(1), however, only requires a plaintiff to prove that an unlawful motive was *a* factor in the action complained of. If, as respondent contends, an employee were required to present his or her USERRA claim when asked for his version of a dispute, or whenever an employer has a grievance process, employees would be obligated to exhaust, and perhaps be limited to, an employer's internal remedial mechanisms. Section 4302(b), however, provides that USERRA

> supersedes any . . . contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter . . . .

Thus an employer could not, by establishing a grievance procedure or other mechanism, require an employee to invoke that procedure before or instead of filing suit. Section 4302 (b) precludes an employer from "impos[ing] a requirement that the employee grieve a USERRA matter." *Russell v. Merit Systems Review Bd.*, 324 Fed. Appx. 872,875 (Fed. Cir. 2008).

If, as respondent contends, an ultimate decisionmaker's "independent" consideration (and rejection) of a worker's USERRA claim provides a complete defense, that company official's decision constitutes the authoritative determination of the merits of that claim; section 4323(b), however, provides that USERRA claims are to be determined by independent federal and state courts. And if, as respondent urges, the existence of *any* investigation by the ultimate decisionmaker is a bar to litigation, then that ex parte self-interested inquiry conducted by the employer itself would replace the adversarial process established by the Federal Rules of Civil Procedure for discovering and presenting relevant evidence. Thus in this case, in lieu of the depositions, document production, sworn testimony, cross-examination and evidentiary record which convinced a jury that Staub was the victim of discrimination forbidden by USERRA, the process for assessing Staub's USERRA claim would be reduced to a single, casual conversation between Buck (who had already dismissed Staub) and Carothers (who was one of Buck's subordinates).

Respondent argues that if one of the circumstances constituting any of its proposed defense is present, that would "break[] the chain of causation" between the

biased supervisor and the adverse employment action.[16] But whether an earlier event (such as a false statement by a biased supervisor) is a cause of a later occurrence (e.g., the dismissal of the plaintiff) is a quintessential factual issue not susceptible to such per se rules. Causation in fact is

> a matter upon which lay opinion is quite as competent as that of the most experienced court. For that reason, in the ordinary case, it is peculiarly a question for the jury.

Prosser and Keeton on The Law of Torts, § 41 pp. 264-64 (5th ed. 1984).

To be sure, in some instances one of the circumstances invoked by Proctor might demonstrate that the requisite causation was absent. For example, if a report from a biased supervisor contained both truthful and inaccurate information, and the ultimate decisionmaker decided on the basis of some other source to disregard the falsehoods and rely only on the rest of the report, there would be no causal connection between the inaccuracies and whatever action was taken by that ultimate decisionmaker. On the other hand, a dismissal decision based on charges fabricated by a biased supervisor would still be caused by those fabrications even if the ultimate decisionmaker made an "independent decision" about the seriousness of those (inaccurate) reports, or considered additional evidence that had no bearing on the truthfulness of the charges.

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16. R.Br. 13, 39, 41, 51, 52.

Most if not all of the new proposed defenses would allow employers to effectively exempt themselves from the requirements of USERRA, as well as from all federal employment discrimination laws. An employer would be largely immune from liability if it gave ultimate decisionmaking authority over important employment decisions to officials other than immediate supervisors (something that the amici insist already is common), and then followed whatever prescription was required by the defense, directing, for example, the ultimate decisionmakers take the pro forma step of obtaining information from more than one source.

The traditional agency doctrine of respondeat superior imposes strict liability on employers for the acts of officials acting as their agents. That strict liability provides an employer with

> the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.

Prosser and Keeton on The Law of Torts, § 69, p. 501 (5th ed. 1984).

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst . . . which causes employers . . . to self-examine and to self-evaluate their employment practices . . . ."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975)(*quoting United States v. N.L. Industries, Inc*,

479 F. 2d 354, 379 (8th Cir. 1973)). The proposed new defenses would largely undermine that salutary incentive, and replace it with incentives to hire better lawyers and to take every precaution to isolate higher officials from knowledge of any violations of federal employment statutes.

III. PROXIMATE CAUSE DOES NOT IMMUNIZE PROCTOR FROM LIABILITY

Proctor asserts that in a case such as this the discriminatory actions of Mulally and Korenchuk, even if they were in fact the but-for cause of Staub's dismissal, nonetheless were not the proximate cause of that termination.[17] Respondent apparently contends that Buck's own actions, at least if one of the asserted defenses can be established, would be the superseding cause of the dismissal. Although the existence of a superseding cause does bar imposition of liability in tort for an earlier tortious act, the well-established standards regarding a claim of superseding cause make abundantly clear that that doctrine does not apply here.

First, a defendant cannot invoke an asserted superseding cause where an *intentional* tort resulted in the very harm that was the specific purpose of that original act.

> A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable, except where

17. R.Br. 16, 46, 53.

> the harm results from an outside force the risk of which is not increased by the defendant's act.

Restatement (Second) of Torts, § 435A (1965).[18] In this case the dismissal of Staub that ultimately occurred was indeed the harm that Mulally and Korenchuk intended.

Second, superseding cause cannot be invoked to defeat a claim where the later cause at issue was itself a result of the earlier misconduct.

> Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.

Restatement (Second) of Torts, § 442A.[19] In the instant case Buck's actions did not occur, by sheer coincidence, after the actions of Mulally and Korenchuk; to the contrary, the termination order signed by Buck expressly relied on, and was a result of, the Corrective Action engineered by Mulally and the misinformation provided by Korenchuk.

Third, the superseding cause defense can only be invoked where the later action was that of a "third party." *Id.* at §§ 440[20], 442(d), 442(e), 442(f), 442B, 452. In this instance, however, Buck, Mulally and Korenchuk were all agents of the same principal—Proctor.

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18. See § 442(a) (harm must be "different in kind from that which would otherwise have resulted from the actor's negligence").

19. See *id.*, §§ 443, 449.

Finally, a defendant cannot invoke the superseding cause defense by demonstrating that *after* the original wrong occurred the defendant did everything in its power to prevent the subsequent injury.

> If the actor's negligent conduct is a substantial factor in bringing about harm to another, the fact that after the risk has been created by his negligence the actor has exercised reasonable care to prevent it from taking effect in harm does not prevent him from being liable for the harm.

Id. at § 437.[21]

IV. FEDERAL EMPLOYMENT STATUTES SHOULD NOT BE LIMITED BY SPECIAL AGENCY OR CAUSATION STANDARDS

The administrative arrangement in the instant case—in which one or more supervisors provide information or recommendations to a separate, ultimate decisionmaker—is a common one in all but the smallest organizations, and is used to make innumerable decisions about a wide range of matters other than employment. Whether the entity's liability is limited by the purposes and knowledge of that ultimate decisionmaker is thus a matter of broad significance.

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20. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

21. See section 437, comment a ("Once his negligence has created the risk, his efforts to prevent it taking harmful effect, no matter how carefully planned and executed, can avail him (Cont'd)

The Seventh Circuit's restrictive cat's paw doctrine—which largely immunizes organizations from liability for the motives or knowledge of anyone but the ultimate decisionmaker—is avowedly a rule applicable only to employment claims. That circuit has applied the doctrine in twenty-nine decisions, every one involving employment-related claims[22]; the court of appeals has never on this ground rejected any other type of claim.

To the contrary, the Seventh Circuit has made clear that in commercial and other litigation, liability will turn simply on whether the official who acted with an unlawful purpose was acting in the scope of his employment. *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F. 3d 702, 708 (7th Cir. 2008). In most cases the Seventh Circuit adheres to the doctrine of respondeat superior, correctly explaining that that rule imposes strict liability on a defendant, regardless of whether the defendant did all it could to prevent the misconduct at issue. *Browning-Ferris Industries, Inc. v. Ter Mart*, 195 F. 3d 953, 956 (7th Cir. 1999).

> The liability of an employer for torts committed by its employees—without fault on his part—when they are acting within the scope of their employment, the liability that

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(Cont'd)
only if they are successful and so prevent his conduct from resulting in the harm which was threatened by the risk he created. . . . His liability is based upon his negligence in creating the risk, not upon his failure to exercise reasonable care to nullify it—as might be the case if the risk had been created by a third person.").

22. A list of those decisions is set out in an appendix to the brief.

> the law calls "respondeat superior," is a form of strict liability. It neither requires the plaintiff to prove fault on the part of the employer nor allows the employer to exonerate himself by proving his freedom from fault.

Konradi v. United States, 919 F. 2d 1207, 1210 (7th Cir. 1990). But in employment cases subject to its cat's paw doctrine, the Seventh Circuit takes the opposite position, rejecting respondeat superior as unfair and insisting that a principal ought not be held liable unless it can be faulted for having failed to take some practicable step to prevent the violation complained of. "[E]mployers should be liable for their employees' racism only in the general class of cases in which an employer has the practical ability to head off injury to its employee's victim." *Brewer v. Bd. of Trustees of the Univ. of Ill.*, 479 F. 3d 908, 920 (7th Cir. 2007).

In the instant case amici representing a large number of private businesses have urged this Court to adopt some version of the stringent cat's paw doctrine. But although these amici differ in their arguments and approach, they share one common position—none of them argues that the cat's paw doctrine should be applied to ordinary, non-employment litigation. Only in the context of a claim under USERRA or other federal employment statutes do they object that the application of otherwise traditional agency and tort principles would be unfair. From the perspective of these amici, that distinction is understandable, indeed vital. Private businesses which buy goods, services, or complex financial products could not rely on the good faith of

their counter-parties or of private financial rating agencies, could not obtain redress for fraud, and could not enforce their rights under a wide range of federal statutes if those with whom they deal were able to avoid liability by asserting the innocence or ignorance of some ultimate decisionmaker.

We urge only that the same established principles of agency and tort law that Proctor Hospital itself would invoke and which the Seventh Circuit would apply in a mundane commercial dispute ought to protect as well the members of the armed forces who risk their lives, burden their families, and imperil their jobs by serving the nation in the Reserves and the National Guard. "[O]ur men and women in uniform . . . . should not have to worry whether they will have a job waiting at home when they are . . . carrying out the President's orders." 139 Cong. Rec. H2210 (May 4, 1993) (remarks of Rep. Stump).

V. THIS COURT NEED NOT REVISIT THE FACTUAL DISPUTES LITIGATED IN THE COURTS BELOW

Respondent devotes the largest portion of its brief to factual issues that were litigated in the courts below. Respondent contends that Korenchuk was not motivated by any objection to Staub's military service, and that neither Korenchuk nor Mulally had any improper influence on the ultimate dismissal decision. These factual issues were fully litigated at trial, resolved by the jury that heard this case, and reviewed by the courts below. This Court need not revisit these issues.

(1) The trial jury was specifically instructed that the plaintiff was required to prove that his military service was a motivating factor in his dismissal. (Doc. 109, p. 18). The jury was also instructed that it could not hold Proctor liable based on the motives of Korenchuk or Mulally unless the plaintiff demonstrated that one or both actually affected Buck's decision. (JA 71a).

The jury concluded that the "Plaintiff proved by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the Defendant's decision to discharge him." (JA 68a). That finding necessarily meant that the jury determined that Mulally and/or Korenchuk had such an unlawful motive. The jury also found that the defendant had not "proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status." (*Id.*). That finding necessarily meant that the jury determined that Proctor had failed to demonstrate that neither Mulally nor Korenchuk used misinformation to bring about the dismissal of Staub. Had the jury concluded (as Proctor contends) that the improperly motivated official or officials had not caused Staub's termination, it would have found that the actual dismissal had occurred "regardless of [Staub's] military status," and thus would have returned a verdict for the defendant.

The district court denied Proctor's post-trial motion for judgment as a matter of law, concluding that "there was sufficient evidence put on by the Plaintiff to sustain the jury's verdict." (JA59a).

> I reject Defendant's characterization of Plaintiff's evidence as a "scintilla" and of the remarks as "stray." There were a number of

> remarks, some of them temporally proximate to the discipline originally imposed on Plaintiff and others temporally proximate to his discharge. There were inconsistencies between the facts as various witnesses recalled them and as set forth in the documents related to the discipline.

(*Id.*). The court of appeals, although holding that Staub failed to satisfy the Seventh Circuit's stringent "singular influence" standard, did not question the sufficiency of the evidence, "viewed in the light most favorable to the verdict" (JA 32a), to demonstrate that misinformation from an improperly motivated official—Mulally and/or Korenchuk—had brought about Staub's dismissal. (See JA 32a-39a).

(2) Respondent urges that the district court erred in admitting evidence regarding statements by Korenchuk that indicated hostility towards Staub's military status. (R.Br. 12 ("No Circuit would have allowed such stale evidence of animus to be presented to a jury"), 39a).[23] But respondent never objected to the admission of this evidence, either in its motions in limine or when the testimony was offered at trial (Tr. 256-64). Any objection to its admissibility was thus waived. In this Court respondent argues that there was insufficient evidence that Korenchuk objected to Staub's military service; in the court of appeals, however, respondent did not challenge the jury verdict on that basis.

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23. As the district court noted, Korenchuk made these remarks about Staub's military service at about the same point in time when Korenchuk fired Staub. (JA 59a; see JA 32a n. 1).

Korenchuk's biased remarks were not the only evidence offered by Staub to demonstrate that Korenchuk had acted with an unlawful motive. In the period leading up to Staub's dismissal, Korenchuk expressed displeasure that Staub was away for drill on weekends, and indicated unhappiness at the prospect that Staub would be called up again in 2004. (JA 35a). Korenchuk was well aware of Mulally's objection to Staub's military service, and consciously did little about it. (JA 33a; Tr. 344, 375-76). When Staub returned to work following Operation Iraqi Freedom, Korenchuk warned a hospital employee that Mulally was "out to get" Staub. (JA 34a). A reasonable jury could infer that Korenchuk made no effort to stop Mulally's vendetta because he sympathized with her hostility to Staub's military service. A jury could also infer that Korenchuk acted with such a motive on March 20, 2004, when he reported to Buck that he had been unable to find Staub but said nothing about Sweborg, who was with Staub during the hours at issue, and who necessarily would have been no more easy to locate. And a jury assuredly could have concluded that Korenchuk's conduct in 2004 indicated that his earlier outspoken objection to Staub's military service had never abated.

(3) Proctor objects that Korenchuk's motives were irrelevant because he did not provide any inaccurate information to Buck or withhold from her any important facts. (R.Br. 39-39). Respondent, however, failed to advance that argument in the court of appeals.

The termination notice signed by Buck on March 20 indicated that she believed that Staub had never complied with the January 27 directive to report to

Korenchuk or Mulally whenever he left the Angio lab. (JA 74a). Buck testified that the misconduct asserted in the notice reflected her reason at the time for the dismissal. (Tr. 48). If she so believed, it could only have been because that is what Korenchuk told her; Korenchuk was the sole source of such information. Korenchuk, however, did not claim that Staub had never complied with the directive (Tr. 107), and in this Court respondent does not defend the accuracy of the accusation in the termination notice. If, as that evidence indicates, Buck decided to fire Staub based on a false report from Korenchuk, that report clearly would have been the cause of the dismissal.

There is also evidence that Korenchuk deliberately withheld from Buck the fact that Staub had left a voicemail message for Korenchuk on March 20, 2004. Although Proctor attacks the credibility of Staub's testimony that he left such a message, there was not even a direct conflict of testimony on this issue. Staub stated that he had left the voicemail message, and Korenchuk testified only that he could not recall one way or the other whether Staub had left telephone messages. (Tr. 108). Proctor insists there was no evidence "that Korenchuk was aware of any voicemail from Staub." (R.Br. 38). But if the jury credited Staub's testimony that he left such a message for Korenchuk, it would reasonably have inferred that Korenchuk had heard it.

This fact-bound argument now advanced by Proctor in this Court is different from the contention which it offered in the trial court. At trial, rather than disputing Staub's testimony about the voicemail, Proctor argued

that it simply did not matter whether Staub had left such a message on March 20 because—or so the hospital then contended—Staub actually was fired for having failed to report in to Korenchuk on March 19, the day before. (Tr. 627-28). (Korenchuk, however, testified that the asserted problem occurred on March 20, not a day earlier. (JA 38a)). Proctor no longer advances that contention, but instead faults the jury for failing to accept an argument which Proctor's trial counsel never made.

(4) Proctor does not dispute the existence of substantial evidence that Mulally objected to Staub's military service. It argues, however, that there was no connection between Mulally's hostility and the decision to fire Staub. Specifically, Proctor insists that Mulally had no significant role in the issuance of the January 27 directive. There is, however, compelling evidence to the contrary.

It is undisputed that Mulally herself actually prepared and co-signed the Corrective Action. (Tr. 123). At trial Korenchuk testified that he approved the Corrective Action because he was told by Mulally that Staub could not be found on January 26. (Tr. 97). But neither Mulally nor anyone else testified that they had looked for or been unable to find Staub, who testified without contradiction that he was in the Angio unit during the entire period in question. If the jury credited Korenchuk's testimony, it could have concluded that the Corrective Action drafted by Mulally was approved by Korenchuk only because Mulally had provided him with inaccurate information.

At trial Mulally offered a different justification for the January 27 Corrective Action. Mulally testified that Staub, by remaining in the Angio unit after he learned there were no patients, had violated a standing order that he was to go to the Diagnostic unit whenever that occurred. (Tr. 147). Staub and Sweborg, on the other hand, testified that there was no such standing order. (JA 37a; Tr. 251-52, 357-58). Here too the jury could have concluded that inaccurate information from Mulally was the basis of the Corrective Action.

In this Court Proctor offers yet a third explanation designed to minimize Mulally's role, asserting that the Corrective Action was issued because Staub and Sweborg failed to answer several telephone calls from the Diagnostic unit on the morning of January 26. (R.Br. 25-27). The Corrective Action itself, however, makes no reference to these asserted telephone calls. Moreover, none of the officials who actually signed the Corrective Action, including Mulally, ever testified that that disciplinary action was taken because Staub had failed to answer a telephone call.

CONCLUSION

The decision of the Court of Appeals should be reversed and the judgment of the district court should be affirmed.

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APPENDIX

APPENDIX A — SEVENTH CIRCUIT DECISIONS INVOLVING THE CAT'S PAW DOCTRINE

Hill v Potter, — F. 3d —, 2010 WL 3385194 (7th Cir., Aug. 30, 2010)(employment claim under the Age Discrimination in Employment Act and the Americans With Disabilities Act)

Lindsey v. Walgreen Co., — F. 3d —, 2010 WL 3156549 (7th Cir. Aug. 11, 2010)(employment claim under the Age Discrimination in Employment Act)

Kodish v. Oakbrook Terrace Fire Protection Dist., 604 F. 3d 490 (7th Cir. 2010)(employment claim under the First Amendment)

Long v. Teachers' Retirement System of Illinois, 585 F. 3d 344 (7th Cir. 2009)(employment claim under the Family and Medical Leave Act)

Waters v. City of Chicago, 580 F. 3d 575 (7th Cir. 2009)(employment claim under the First Amendment)

Mach v. Will County Sheriff, 580 F. 3d 495 (7th Cir. 2009)(employment claim under the Age Discrimination in Employment Act)

Martino v. MCI Communications Services, Inc., 574 F. 3d 447 (7th Cir. 2008)(employment claim under the Age Discrimination in Employment Act)

Hobbs v. City of Chicago, 573 F. 3d 454 (7th Cir. 2009)(employment claim under Title VII and section 1981)

Appendix A

Staub v. Proctor Hospital, 560 F. 3d 647 (7th Cir. 2009)(employment claim under USERRA)

Campion, Barrow & Associates, Inc. v. City of Springfield, Ill., 559 F. 3d 765 (7th Cir. 2009)(employment contract claim under the First Amendment)

Andonissamy v. Hewlett-Packard Co., 547 F. 3d 841 (7th Cir. 2008)(employment claim under Title VII and the Family and Medical Leave Act)

Metzger v. Illinois State Police, 519 F. 3d 677 (7th Cir. 2008)(employment claim under Title VII)

Jennings v. Illinois Dept. of Corrections, 496 F. 3d 764 (7th Cir. 2007)(employment claim under Title VII)

Brewer v. Board of Trustees of University of Ill., 479 F. 3d 908 (7th Cir. 2007)(employment claim under Title VI and Title VII)

Phelan v. Cook County, 463 F. 3d 773 (7th Cir. 2006)(employment claim under Title VII and the Fourteenth Amendment)

Healy v. City of Chicago, 450 F. 3d 732 (7th Cir. 2006)(employment claim under the First Amendment)

Byrd v. Illinois Dept. of Public Health, 423 F. 3d 696 (7th Cir. 2005)(employment claim under Title VII)

Appendix A

Myrick v. Aramak Services, Inc., 125 Fed. Appx. 705 (7th Cir. 2005)(employment claim under Title VII and section 1981)

Lust v. Sealy, Inc., 383 F. 3d 580 (7th Cir. 2004)(employment claim under Title VII)

Davis v. Con-Way Transp. Central Express, Inc., 368 F. 3d 776 (7th Cir. 2004)(employment claim under Title VII)

Rogers v. City of Chicago, 320 F. 3d 748 (7th Cir. 2003)(employment claim under Title VII)

Mateu-Anderegg v. School Dist. of Whitefish Bay, 304 F. 3d 618 (7th Cir. 2002)(employment claim under Title VII)

Schreiner v. Caterpillar, Inc., 250 F. 3d 1096 (7th Cir. 2001)(employment claim under Title VII)

Eiland v. Trinity Hosp., 150 F. 3d 757 (7th Cir. 1998)(employment claim under Title VII and section 1981)

Sattar v. Motorola, Inc., 138 F. 3d 1164 (7th Cir. 1998)(employment claim under Title VII)

Willis v. Marion County Auditor's Office, 118 F. 3d 542 (7th Cir. 1997)(employment claim under Title VII)

Wallace v. SMC Pneumatics, Inc., 103 F. 3d 1394 (7th Cir. 1997)(employment claim under Title VII)

Appendix A

Moses v. City of Evanston, 97 F. 3d 1454 (7th Cir. 1996)(employment claim asserting bias in decisionmaking)

Shager v. Upjohn Co., 913 F. 3d 398 (7th Cir. 1990)(employment claim under the Age Discrimination in Employment Act)

AMICUS CURIAE BRIEF

No. 09-400

In the Supreme Court of the United States

VINCENT E. STAUB, PETITIONER

v.

PROCTOR HOSPITAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, and in what circumstances, an employer can be liable under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*, based on the anti-military animus of supervisors who did not take an adverse employment action themselves, but whose anti-military animus was a motivating factor for that action.

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In the Supreme Court of the United States

No. 09-400

VINCENT E. STAUB, PETITIONER

v.

PROCTOR HOSPITAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether, and in what circumstances, an employer can be liable under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.*, based on the anti-military animus of supervisors who did not take an adverse employment action themselves, but whose anti-military animus was a motivating factor for that action. The United States has a significant interest in the resolution of that question. The Secretary of Labor has substantial administrative responsibilities under USERRA, 38 U.S.C. 4321-4333 (2006 & Supp. II 2008), and has promulgated regulations implementing the statute, 20 C.F.R. Pt. 1002. The Attorney General enforces USERRA in court against public and private employers.

38 U.S.C. 4323 (2006 & Supp. II 2008). USERRA also applies to the United States as an employer. 38 U.S.C. 4324-4325 (2006 & Supp. II 2008). In addition, the Equal Employment Opportunity Commission is responsible for administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other federal statutes prohibiting employment discrimination, and this case may affect the interpretation of those statutes. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. In enacting USERRA, Congress sought "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service" and "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. 4301(a)(1) and (3). To that end, 38 U.S.C. 4311(a) provides that "[a] person who is a member of * * * a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership." *Ibid.*

An employee who has suffered discrimination in violation of USERRA may bring an action against his or her employer for damages and equitable relief. 38 U.S.C. 4323 (2006 & Supp. II 2008). The employee can establish a prima facie case of discrimination by showing that a protected status or activity—such as the performance of military service, see 20 C.F.R. 1002.22—was "a motivating factor in the employer's action." 38 U.S.C. 4311(c)(1). If the employee makes such a showing, the employer may avoid liability by establishing that "the

action would have been taken in the absence of" the employee's military status. *Ibid.*

2. Petitioner, a member of the United States Army Reserve, was employed by respondent as an angiography technologist. Pet. App. 2a-3a. The head of petitioner's department, Michael Korenchuk, was critical of petitioner's reserve obligations, which he called "a b[u]nch of smoking and joking and [a] waste of taxpayers[']] money." *Id.* at 4a (brackets in original). Janice Mulally, who was second in command of the department, was also hostile to petitioner's reserve duties. *Id.* at 3a-4a. In 2000, when Mulally took over preparing respondent's work schedules, she began "schedul[ing] him for additional shifts without notice," *id.* at 4a, saying that the extra shifts were a way for him to "pay[] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves," *ibid.* (second set of brackets in original). Mulally also placed petitioner on a weekend work rotation, thereby creating scheduling conflicts between petitioner's work and his weekend military obligations. *Ibid.* Mulally called petitioner's reserve unit several times to try to change his drill dates so he could work at the hospital; once, when the reserve unit administrator refused to excuse petitioner from mandatory training, Mulally swore at him and hung up. *Id.* at 8a. On another occasion, Mulally told Leslie Sweborg, one of petitioner's co-workers, that petitioner's "military duty had been a strain on the[] department," and she asked Sweborg "to help her get rid of him." *Id.* at 5a (brackets in original). After petitioner returned from active duty in early 2003, Korenchuk knew "that Mulally was 'out to get' [petitioner]," but he did nothing to stop her. *Id.* at 4a-5a.

In January 2004, petitioner was ordered "to report for 'soldier readiness processing'" in anticipation of another call to active duty. Pet. App. 6a. Korenchuk was concerned about the expense of having to hire a temporary replacement for petitioner. *Ibid.* Near the end of the month, Mulally gave petitioner a written warning for not being in his work area. *Ibid.* According to Mulally, employees in petitioner's unit were required to report to the diagnostic imaging services unit whenever they were not working with a patient. *Id.* at 6a-7a. Petitioner and Sweborg (who also received a warning) disputed that such a policy existed or that they had violated it, but Korenchuk signed Mulally's warning to petitioner in order "to get her off of his back." *Id.* at 7a. Under the terms of the warning, petitioner was required to report to Korenchuk or Mulally whenever he did not have any patients and whenever he needed to leave his work station. *Ibid.*; see J.A. 75a.

In April 2004, Angie Day, a former co-worker of petitioner's, met with Korenchuk, Vice President of Human Resources Linda Buck, and Chief Operating Officer R. Garrett McGowan. Pet. App. 8a. In the past, Day had complained about having to work outside of her ordinary scheduled hours when petitioner was away on military duty. *Id.* at 44a. This time, she complained that petitioner was "abrupt" in his dealings with her and would "absent himself from the department." *Id.* at 8a. After the meeting, McGowan ordered Buck to create a plan to solve petitioner's availability problems. *Id.* at 8a-9a. Buck never did that, however, because on April 20, 2004, Korenchuk reported to Buck that petitioner could not be located and had failed to report in as instructed. *Id.* at 9a-10a; see *id.* at 9a n.3. Based on that report and a review of petitioner's personnel file, Buck decided that

petitioner should be discharged. *Id.* at 10a-11a; 1/7/08 Tr. 62, 105-106.

During the time that Korenchuk was unable to find petitioner, petitioner was in the hospital cafeteria having lunch with Sweborg. Pet. App. 9a. When petitioner returned from lunch, he told Korenchuk that he and Sweborg had looked for him earlier and had left him a voice mail explaining that they were leaving for lunch. *Ibid.* Korenchuk then escorted petitioner to Buck's office. *Ibid.* When petitioner arrived, Buck did not ask him about the January warning or whether he had reported in as directed. 1/8/08 Tr. 361-363. Instead, Buck simply gave him his termination notice, and a security guard immediately escorted petitioner out of Buck's office. Pet. App. 10a; 1/8/08 Tr. 362. Sweborg was not disciplined. Pet. App. 10a.

Petitioner's termination notice stated that he was being discharged for failing to follow the terms of the January warning. J.A. 74a; Pet. App. 10a. Specifically, the notice stated: "To date, [petitioner] has ignored [the] directive" that he "remain in the general diagnostic area unless [he] specifies to [Korenchuk] or [Mulally] where and why he will go elsewhere." J.A. 74a. Similarly, Buck's documentation of her meeting with Korenchuk stated that her termination decision was "[b]ased on the disciplinary action done in January and the continuing problems." J.A. 73a.

Petitioner unsuccessfully challenged his termination through respondent's grievance process. Pet. App. 11a. Although petitioner argued in his grievance that Mulally had fabricated the basis for the January warning, "Buck did not follow up with Mulally about this claim * * * and she did not investigate [petitioner's] contention that Mulally was out to get him because he was in the Re-

serves." *Ibid.* Buck's investigation consisted solely of discussing the January warning with another Human Resources employee who had received information from Mulally and was present when the warning was given, but not when the alleged misconduct occurred. 1/7/08 Tr. 65; Pet. App. 11a.

3. Petitioner brought this action against respondent in the United States District Court for the Central District of Illinois, alleging that his termination violated USERRA. With the parties' consent, the district court referred the case for a jury trial before a magistrate judge. Pet. App. 23a. As required by *Brewer* v. *Board of Trustees of the University of Illinois*, 479 F.3d 908, 917 (7th Cir.), cert. denied, 552 U.S. 825 (2007), the court instructed the jury that "[a]nimosity of a co-worker toward the [petitioner] on the basis of [petitioner's] military status as a motivating factor may not be attributed to [respondent] unless that co-worker exercised such singular influence over the decision-maker that the co-worker was basically the real decision maker." Pet. App. 16a. The court also instructed that "[i]f the decision maker is not wholly dependent on a single source of information but instead conducts its own investigation into the facts * * *, [respondent] is not liable for a non-decision maker's submission of misinformation or selectively chosen information or failure to provide relevant information to the decision maker." *Ibid.*

The jury returned a special verdict in which it found that petitioner "proved by a preponderance of the evidence that [his] military status was a motivating factor in [respondent's] decision to discharge him" and that respondent failed to prove that petitioner "would have been discharged regardless of his military status." J.A. 68a. The jury awarded $57,640 in damages. Pet. App.

23a. The magistrate judge subsequently denied respondent's motion for judgment as a matter of law or for a new trial. *Id.* at 23a-31a.

4. The court of appeals reversed. Pet. App. 1a-21a. The court began by stating that the case involved what it described as "the 'cat's paw' theory" of liability, a term derived from a La Fontaine fable in which a monkey persuades an unwitting cat to pull chestnuts out of a hot fire. *Id.* at 1a. Under that theory, "the discriminatory animus of a nondecisionmaker is imputed to the decisionmaker where the former has singular influence over the latter and uses that influence to cause the adverse employment action"—in other words, where the decisionmaker is the dupe, or cat's paw, of the employee with a discriminatory motive. *Id.* at 2a. The court emphasized that, "true to the fable," liability under the cat's paw theory "requires a blind reliance, the stuff of 'singular influence.'" *Id.* at 21a.

The court of appeals held that the jury instructions were "not technically wrong" because they told the jury that it could "only consider nondecisionmaker animosity in the case of singular influence, and even then that the employer is off the hook if the decisionmaker did her own investigation." Pet. App. 17a. But the court added that if there is insufficient evidence to support a finding of "singular influence," then the trial court "has no business admitting evidence of animus by nondecisionmakers." *Ibid.* In this case, the court of appeals concluded, the magistrate judge had erred in admitting evidence of Mulally's animus—"the strongest proof of antimilitary sentiment"—without first "making a threshold determination of whether a reasonable jury could find singular influence." *Id.* at 18a-19a.

The court of appeals went on to hold that, based on the evidence presented at trial, respondent was entitled to judgment as a matter of law. Pet. App. 19a. The court stated that Buck, who made the decision to fire petitioner, was "free of any military-based animus," and "a reasonable jury could not find that Mulally (or anyone else) had singular influence over Buck." *Id.* at 20a. Instead, the court determined that "Buck looked beyond what Mulally and Korenchuk said" about petitioner. *Ibid.* Although her "investigation could have been more robust," the court continued, the decisionmaker need not "be a paragon of independence" so long as she "'is not wholly dependent on a single source of information' and conducts her 'own investigation into the facts relevant to the decision.'" *Id.* at 20a-21a (quoting *Brewer*, 479 F.3d at 918). The court therefore concluded that "a reasonable jury could [not] have concluded that [petitioner] was fired because he was a member of the military." *Id.* at 21a.

SUMMARY OF ARGUMENT

In order to encourage civilian service in the uniformed services, USERRA prohibits employment discrimination "on the basis of" military status. 38 U.S.C. 4311(a). Specifically, 38 U.S.C. 4311(c)(1) provides that an employer is liable if an employee establishes that his or her military status was a "motivating factor" in an adverse employment action, and the employer fails to prove that it would have taken that action regardless of the employee's military status. Under USERRA, an employer is liable when a supervisor acting with a discriminatory motive uses the authority that has been delegated to him or her to cause an adverse employment action.

USERRA specifically defines "employer" to include any person "to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i). When an employer delegates authority to a supervisor to engage in customary employment responsibilities—for example, to monitor employees and report on their performance—a supervisor's exercise of that authority falls within the scope of his or her employment. Accordingly, if such authority is exercised in a discriminatory manner and causes an adverse employment action, the employer is liable for the supervisor's misconduct. That result is a natural consequence of the settled rule of vicarious employer liability for torts committed by agents acting within the scope of their employment. In addition, the employer is liable under the "aided in the agency relation" principle recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), because a supervisor who exercises delegated authority to cause an adverse employment action is aided in accomplishing a tort by the existence of the agency relationship with the employer.

The court of appeals disregarded those principles when it held that an employer is liable for the discriminatory acts of a supervisor only when the supervisor has "singular influence" over the decisionmaker "and uses that influence to cause the adverse employment action." Pet. App. 2a, 21a. The "singular influence" standard has no basis in the text of USERRA. Indeed, it would frustrate the statutory purpose by allowing employers to escape liability even in cases where a supervisor's discrimination is a substantial cause of the adverse employment decision, thus permitting employer-authorized, discriminatory misconduct to go unremedied.

To establish a violation of USERRA, an employee must show causation—that is, that the supervisor's discriminatory misuse of delegated authority was a substantial factor in the adverse employment action. An employer's independent investigation into the events underlying an adverse employment action may break the chain of causation between a supervisor's discriminatory misconduct and that action. In addition, an investigation may establish that the action would have been taken anyway, thus creating a defense to liability under Section 4311(c)(1). Such an investigation, however, must be truly independent. Simply reviewing evidence compiled by a biased supervisor will not break the chain of causation between the supervisor's bias and the ultimate employment action.

In light of those principles, the court of appeals erred in setting aside the jury's verdict. The jury specifically found that petitioner proved by a preponderance of evidence that his military status was a "motivating factor" in respondent's decision to discharge him. J.A. 68a. There was "abundant evidence" of anti-military animus on the part of petitioner's supervisors, Pet. App. 18a, and the evidence established that the supervisors' January 2004 disciplinary action against petitioner and April 2004 report that he had disregarded the terms of the January warning were significant factors in causing his dismissal. *Id.* at 10a; J.A. 74a. The discriminatory animus of the supervisory employees who were not the decisionmaker therefore set in motion and played a substantial role in driving the adverse employment action. That animus was a "motivating factor" even if the biased employees did not exercise "singular influence" over the decisionmaker.

The record at trial also contains substantial support for the jury's finding that respondent's investigation was insufficient to establish that petitioner would have been discharged regardless of his military service. The court of appeals held that the decisionmaker's investigation broke the causal chain between the supervisors' discriminatory motives and petitioner's termination because the decisionmaker considered facts other than the supervisor's discriminatory animus; that is, the decisionmaker was "not wholly dependent on a single source of information." Pet. App. 21a (quoting *Brewer* v. *Board of Trs. of the Univ. of Ill.*, 479 F.3d 908, 918 (7th Cir.), cert. denied, 552 U.S. 825 (2007)). But the limited investigation that respondent undertook was little more than a review of petitioner's personnel record. Review of a preexisting personnel file—which did not contain any information about the incident that precipitated petitioner's termination—could not independently confirm the basis for the termination, and it therefore was insufficient to undermine the jury's verdict.

ARGUMENT

AN EMPLOYER IS LIABLE UNDER USERRA WHEN A SUPERVISOR ACTING WITH A DISCRIMINATORY MOTIVE USES DELEGATED AUTHORITY TO CAUSE AN ADVERSE EMPLOYMENT ACTION SUCH AS A DISCHARGE

A. Under Agency Principles, An Employer Is Vicariously Liable When A Discriminatorily Motivated Supervisor Uses Delegated Authority To Cause An Adverse Employment Action

This Court has recognized that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate

those rules." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). Since a damages action for a violation of a federal anti-discrimination statute "sounds basically in tort," such an action is governed by general agency principles. *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974). In the case of USERRA, that conclusion is reinforced by the statutory definition of "employer," which expressly includes the employer's agents: any "person * * * that has control over employment opportunities" and any "person * * * to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i).

Under the agency principles that govern USERRA actions, an employer is liable when a supervisor exercises delegated authority in a discriminatory manner and causes an adverse employment action. Because the supervisor's exercise of delegated authority is conduct within the supervisor's scope of employment, the employer is vicariously liable for it. Moreover, even if the supervisor's conduct were not considered to be within the scope of employment, it nevertheless would give rise to vicarious liability because it is conduct that is aided by the agency relation.

1. USERRA's definition of "employer" reflects long-established agency law, under which "principals or employers" are "vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer*, 537 U.S. at 285. That principle applies to "both negligent and intentional torts committed by an employee within the scope of his or her employment." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 756 (1998). And it applies whether or not the employer authorized or knew about the acts of the agent. *Railroad Co.* v. *Hanning*, 82 U.S. (15 Wall.) 649, 657 (1873). Em-

ployees act within the scope of their employment whenever they are "exercising the authority delegated to [them.]" *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909).

Consistent with established agency principles, when an employer delegates authority to a supervisor to engage in customary employment responsibilities—such as assigning work, monitoring an employee's performance, deciding whether to report a matter for discipline, gathering the facts relating to that matter, or making a recommendation on what action should be taken—a supervisor's exercise of that authority falls within the scope of the supervisor's employment. Accordingly, when delegated authority of that kind is exercised in a discriminatory manner and causes an adverse employment action in violation of USERRA, the employer is liable under agency principles and 38 U.S.C. 4303(4)(A)(i).

That conclusion is consistent with this Court's treatment of liability under other employment-discrimination statutes, such as Title VII. In *Ellerth*, the Court held that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment," and that employer liability for supervisor harassment must therefore be based on other agency principles. 524 U.S. at 757. But while no employer delegates authority to supervisors to make sexual advances to those under their supervision, employers customarily do delegate authority to supervisors to assign work, monitor performance, refer matters for discipline, investigate the underlying facts, and make recommendations on what should be done. When supervisors exercise such authority, they act within the scope of their employment.

While some courts have expressed the view that an agent acts within the scope of employment only when

motivated at least in part by an intent to serve the employer, see 1 Restatement (Second) of Agency § 228(1)(c), at 504 (1958) (Restatement (Second)), other courts have held that an agent can act within the scope of employment regardless of the agent's motive, see *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 793-796 (1998). When a supervisor has exercised delegated authority with a discriminatory motive and caused an adverse employment action, the scope-of-employment analysis should not depend on a fact-intensive inquiry into subjective intent, *i.e.*, whether the supervisor acted in part out of a misguided belief that either the discrimination or the underlying employment action would benefit the employer. It is difficult enough to determine whether a supervisor has acted with a discriminatory motive without adding an even more difficult inquiry into whether the supervisor was motivated in part by a belief that discrimination would benefit the employer. And that inquiry is unnecessary in the present context, where the supervisor is exercising delegated authority to undertake customary employment tasks—*e.g.*, to report an employee for a disciplinary infraction—albeit with an improper discriminatory animus. See *Shager* v. *Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (noting that "a supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer," and applying the same principle to a supervisor who caused the plaintiff's discharge by exercising his delegated authority to evaluate subordinates).

2. In any event, vicarious employer liability is not limited to the actions of employees within the scope of

their employment. Rather, as this Court recognized in *Ellerth* and *Faragher*, traditional agency principles also allow the imposition of vicarious liability when an employee is "aided by the agency relation" in the commission of a tort. *Ellerth*, 524 U.S. at 760-765; *Faragher*, 524 U.S. at 801-808; see 2 Restatement (Third) of Agency § 7.08, at 221 (2006); 1 Restatement (Second) § 219(2)(d), at 481. To impose vicarious liability under the "aided in the agency relation" principle, it is not enough to show that the supervisor's agency relation provides "[p]roximity and regular contact" with "a captive pool of potential victims." *Ellerth*, 524 U.S. at 760. Instead, for vicarious liability to attach, there must be "something more than the employment relation itself." *Ibid.*; see *Faragher*, 524 U.S. at 802.

In *Ellerth*, the Court identified "a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the [unlawful employment practice]: when a supervisor takes a tangible employment action against the subordinate." 524 U.S. at 760. A tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." *Id.* at 761. When a supervisor takes a tangible employment action, "there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-762. Accordingly, the requirements of the "aided in the agency relation" principle of vicarious liability "will always be met when a supervisor takes a tangible employment action against a subordinate." *Id.* at 762-763.

Under *Ellerth* and *Faragher*, that principle of vicarious liability is not limited to supervisors who make the

ultimate employment decision that has tangible adverse consequences. Instead, it logically applies whenever a supervisor's "discriminatory act" of a type that a supervisor is empowered to perform because of his supervisory capacity "*results* in a tangible employment action." *Ellerth*, 524 U.S. at 760 (emphasis added). Accordingly, when supervisors, acting with a discriminatory intent, use their delegated authority to monitor performance, report disciplinary infractions, and recommend employment action to effect a tangible employment action, such as a discharge, an employer is vicariously liable under the "aided by the agency relation" principle applied in *Ellerth* and *Faragher*.

3. Under the agency principles discussed above, an employer would not be vicariously liable if a customer, an independent contractor, or a non-supervisory employee, acting with a discriminatory motive but not exercising authority delegated from the employer, falsely reported that an employee engaged in misconduct, and that report caused the employee to be discharged—at least not if the employer had no reason to suspect that the report was fabricated because of discriminatory animus. The distinction between supervisory employees and other actors reflects the fact that employers have "a greater opportunity to guard against misconduct" by supervisors who exercise delegated authority and cause an adverse employment action, as compared to "common workers" or supervisors who are not delegated that kind of authority. *Faragher*, 524 U.S. at 803. Employers "have greater opportunity and incentive to screen [supervisors], train them, and monitor their performance." *Ibid.* Holding employers vicariously liable when supervisors engage in discriminatory misconduct thus gives

effect to USERRA without unreasonably burdening employers.

B. The Court Of Appeals Erred In Requiring Petitioner To Show That The Supervisors With Discriminatory Animus Had "Singular Influence" Over The Actual Decisionmaker

The court of appeals believed that the anti-military animus of an individual who is not the ultimate decisionmaker can trigger liability only when the individual "has singular influence over" the decisionmaker "and uses that influence to cause the adverse employment action." Pet. App. 2a, 21a. It is not enough, the court held, that a supervising employee's animus plays a substantial role in a high-level manager's decision to fire another employee; rather, "true to the fable" of the monkey and the cat, actionable discrimination exists only when the decisionmaker exhibits "a blind reliance" on the biased supervisor's opinions. *Id.* at 21a ("Decisionmakers usually have to rely on others' opinions to some extent because they are removed from the underlying situation. But to be a cat's paw requires more; true to the fable, it requires a blind reliance, the stuff of 'singular influence.'"); see *Brewer* v. *Board of Trs. of the Univ. of Ill.*, 479 F.3d 908, 917-918 (7th Cir.) (holding that, to show "singular influence," "the employee must possess so much influence as to basically be herself the true 'functional[] . . . decision-maker'" and "[t]he nominal decision-maker must be nothing more than the functional decision-maker's 'cat's paw'") (first set of brackets in original; citations omitted), cert. denied, 552 U.S. 825 (2007).

In adopting the "singular influence" standard, the court of appeals appears to have attached inordinate

significance to the "cat's paw" metaphor, basing its holding in part on an exegesis of La Fontaine's fable. Pet. App. 21a. The standard adopted by the court is contrary to USERRA's text, and it would frustrate the statutory purpose.

1. The terms "singular influence" and "blind reliance" do not appear in USERRA, and a "singular influence" standard is inconsistent with the language Congress employed in 38 U.S.C. 4311(c)(1). That provision requires the plaintiff to show nothing more than that his or her military status was a "motivating factor in the employer's action." *Ibid.* Although satisfying that standard will require the plaintiff to show causation, this Court has made clear that protected status or conduct is a "motivating factor" in an action whenever it plays a "substantial" role in bringing that action about. *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977); see *Gagnon* v. *Sprint Corp.*, 284 F.3d 839, 853-854 (8th Cir.), cert. denied, 537 U.S. 1001, and 537 U.S. 1014 (2002).

Protected status can be a "motivating factor" in an adverse employment decision even if it is not a "but-for" cause of that decision. *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 & n.3 (2009) (citation omitted). It follows *a fortiori* that protected status can be a "motivating factor" in an adverse employment decision even if it does not exert "singular influence" over that decision. As the Secretary of Labor observed in commentary accompanying final regulations implementing USERRA, an employee "need not show that his or her protected activities or status was the sole cause of the employment action; the person's activities or status need be only one of the factors that 'a truthful employer would list if asked for the reasons for its decision.'" 70

Fed. Reg. 75,246, 75,250 (2005) (quoting *Kelley* v. *Maine Eye Care Assocs., P.A.*, 37 F. Supp. 2d 47, 54 (D. Me. 1999)). That interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001) (explaining that official agency interpretations of a statute formally adopted through notice-and-comment rulemaking, formal adjudication, or some other "relatively formal administrative procedure tending to foster * * * fairness and deliberation" are entitled to *Chevron* deference); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007) (extending deference to agency's interpretation of its regulations contained in an "Advisory Memorandum" because the interpretation "reflects [the agency's] considered views"); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 477-482 (2001) (applying *Chevron* to agency statements in explanatory preamble to final regulations).

When the discriminatory animus of a supervisory employee who is not the ultimate decisionmaker sets in motion and plays a substantial role in driving an adverse employment decision, that animus is a "motivating factor," even if the ultimate decisionmaker does not act in "blind reliance" on the supervisor's recommendation. See, *e.g.*, *Erickson* v. *USPS*, 571 F.3d 1364, 1368 (Fed. Cir. 2009); *Petty* v. *Metropolitan Gov't of Nashville-Davidson County*, 538 F.3d 431, 446 (6th Cir. 2008), cert. denied, 129 S. Ct. 1933 (2009); *Coffman* v. *Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005). The court of appeals therefore erred in holding that "singular influence" and "blind reliance" are required.

2. One of the principal justifications for the common-law rule of vicarious liability is that it creates

an incentive for employers to select their agents carefully and to monitor them so as to prevent them from causing harm. Fleming James, Jr., *Vicarious Liability*, 28 Tul. L. Rev. 161, 168 (1954) (James). That principle applies with particular force to supervisors, and it parallels USERRA's objective of providing a catalyst for an employer to intensify efforts to eliminate discrimination from the workplace, thus "encourag[ing] noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). As the Tenth Circuit aptly observed in *EEOC* v. *BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (2006), cert. dismissed, 549 U.S. 1334 (2007), a functional-decisionmaker standard like that adopted by the court below would frustrate that objective by "undermin[ing] the deterrent effect of subordinate bias claims, allowing employers to escape liability * * * on the theory that the subordinate did not exercise complete control over the decisionmaker." *Id.* at 487.

The other major reason the common law holds an employer vicariously liable for the wrongful acts of its agents is to ensure that the victims of wrongful conduct are compensated. James 169-170; *Prosser and Keaton on the Law of Torts* 500-501 (W. Page Keeton ed., 5th ed. 1984). The common-law approach rests on the view that, because the employer has sought to profit through its agents, the employer, rather than the innocent victims, should bear the costs when those agents abuse their delegated authority and cause injury to others. *Ibid.* That rationale parallels USERRA's purpose of compensating victims of discrimination, a purpose that Congress underscored when it authorized compensation for violations of the statute. 38 U.S.C. 4323(d)(1). By

allowing employers to escape liability simply because the biased supervisor who caused the adverse employment action did not exercise "singular influence," the decision below would frustrate that purpose as well.

3. The rule adopted by the court of appeals would impede the enforcement not only of USERRA but also of other federal anti-discrimination statutes, including Title VII. Those statutes are governed by the same agency principles that apply to USERRA. See, *e.g.*, 42 U.S.C. 2000e(b) (defining "employer," for purposes of Title VII, to include "any agent" of an employer); 29 U.S.C. 630(b) (similar definition under Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*); *Ellerth*, 524 U.S. at 754 (concluding that Title VII must be interpreted "based on agency principles"); Gov't Br. at 16-23, *BCI Coca-Cola Bottling Co.* v. *EEOC*, No. 06-341 (2007).

In addition to its basic non-discrimination provision, 42 U.S.C. 2000e-2(a), Title VII, like USERRA, contains language making it an unlawful employment practice for an employer to take an adverse action when an improper consideration is a "motivating factor" for that action. 42 U.S.C. 2000e-2(m); see *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003). Certain other anti-discrimination statutes permit relief based not upon a showing that the prohibited consideration was a "motivating factor" for the adverse employment practice, but only upon a showing of "but-for" causation. See, *e.g.*, *Gross*, 129 S. Ct. at 2349-2350 (holding that the ADEA requires "but-for" causation). Whether a biased supervisor's animus must be a but-for cause of an adverse action or merely a motivating factor in that action, the court of appeals' stringent "singular influence" standard is incorrect. For the reasons explained above, a biased supervisor can be a

motivating factor or a but-for cause of an adverse action regardless of whether he or she exerted "singular influence" over the decisionmaker.

C. An Employer's Independent Investigation Can Break The Chain Of Causation Between A Supervisor's Discriminatory Animus And An Adverse Employment Action

As explained above, USERRA requires a plaintiff to establish causation—that is, to show that his or her military status was a "motivating factor" in an adverse employment action. 38 U.S.C. 4311(c)(1); see 38 U.S.C. 4311(a) (prohibiting discrimination "on the basis of" military status). For that reason, even when a supervisor acting with a discriminatory motive has used delegated authority in an attempt to bring about an adverse employment action, the employer may be relieved from liability if it conducts an investigation that breaks the causal chain between the supervisor's misconduct and the adverse employment action. See, *e.g.*, *Poland* v. *Chertoff*, 494 F.3d 1174, 1183 (9th Cir. 2007) ("[I]f an adverse employment action is the consequence of an entirely independent investigation by an employer, the animus of the retaliating employee is not imputed to the employer."); accord *BCI Coca-Cola*, 450 F.3d at 488; *Collins* v. *New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002); *Stimpson* v. *City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), cert. denied, 529 U.S. 1053 (2000); *Long* v. *Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996). In addition, an independent investigation may establish that an employee would have been subject to the adverse action anyway, without regard to his protected status, thus creating a defense to liability under 38 U.S.C. 4311(c)(1).

For example, suppose that a supervisor's discriminatory action was his misuse of delegated authority to provide inaccurate information to the ultimate decisionmaker, but a subsequent investigation uncovered independent and accurate information supporting the employment action at issue. If the ultimate decisionmaker then based her decision to discharge the employee on the independent sources, the investigation could break the causal connection between the supervisor's discriminatory conduct and the adverse action. The supervisor's false information might still be viewed as a but-for cause of the adverse employment action in the sense that it triggered the independent investigation. But because the ultimate decisionmaker based her decision on the independent sources, the biased report of the supervisor would not be a substantial causal factor in bringing about the adverse employment action, and the action would not be taken "on the basis of" military status.

In contrast, suppose that the subsequent investigation consisted of nothing more than asking the supervisor for a fuller account, and the supervisor's account remained deliberately slanted for discriminatory reasons. In that event, if the ultimate decisionmaker then relied on the supervisor's deliberately slanted account to take an adverse employment action, the investigation would not break the causal chain. A reassessment of evidence provided by a biased supervisor cannot overcome the fact that the supervisor deliberately slanted the evidence presented to the ultimate decisionmaker, and the ultimate decisionmaker relied substantially on that information to take an adverse employment action.

In many cases, it may be more difficult to determine whether a subsequent investigation has broken the causal chain. But the ultimate inquiry is always the

same: whether, in light of the investigation, the supervisor's discriminatory use of delegated authority was a substantial factor leading to the adverse employment action. The question is not whether the ultimate decisionmaker was negligent in failing to conduct an investigation or in structuring the investigation in a particular way. An employer has no obligation to conduct an investigation in this context. An investigation is relevant only to the extent that it sheds light on whether the supervisor's discriminatory misuse of delegated authority was a substantial factor in bringing about an adverse employment action, or on whether the adverse action would have been taken anyway. The more thorough and truly independent the investigation, the more likely the employment action will be the result of the investigation rather than the discriminatory actions of the supervisor.

D. The Court Of Appeals Erred In Setting Aside The Jury's Verdict

1. The jury in this case made a specific finding "that [petitioner's] military status was a motivating factor in [respondent's] decision to discharge him." J.A. 68a. That finding established a prima facie case of liability under Section 4311(c)(1), and the evidence at trial fully supported it. To be sure, the evidence was conflicting. But viewing the evidence in the light most favorable to petitioner, the jury could have found that Mulally's efforts to have petitioner discharged were motivated in large measure by his military obligations. Indeed, the court of appeals acknowledged that there was "abundant evidence of Mulally's animosity." Pet. App. 18a; see *id.* at 19a (discussing "the strongest proof of anti-military sentiment"). And both the termination notice given to petitioner and Buck's trial testimony show that Mul-

ally's January 2004 disciplinary action against petitioner was a significant factor in causing his dismissal. *Id.* at 10a; J.A. 74a.

Similarly, the jury heard evidence of Korenchuk's anti-military animus. Pet. App. 4a (describing petitioner's Army Reserve duties as "a b[u]nch of smoking and joking and [a] waste of taxpayers[']] money") (brackets in original). And he too played a major role in petitioner's dismissal. Indeed, it was Korenchuk who reported the offense for which petitioner was terminated —his alleged violation of the terms of the January 2004 warning. *Id.* at 9a-10a.

Under USERRA, respondent may be held liable for Mulally's and Korenchuk's actions in relation to petitioner's termination. A termination decision is a paradigmatic adverse action triggering vicarious employer liability under the employment discrimination laws, including USERRA. See 38 U.S.C. 4311(a) (providing that a member of a uniformed service "shall not be denied * * * retention in employment * * * on the basis of that membership"); *Ellerth*, 524 U.S. at 760 763; *Faragher*, 524 U.S. at 790; *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 70-71 (1986). Moreover, Mulally and Korenchuk were both acting within the scope of their delegated authority when they took the actions contributing to petitioner's dismissal. See *Ellerth*, 524 U.S. at 756; *Faragher*, 524 U.S. at 793. The two of them were petitioner's superiors and had authority to direct his day-to-day work activities. Mulally acted within her authority when she gave petitioner a formal warning for "Failure to Follow Instructions" and "Lack of Cooperation." J.A. 75a; Pet. App. 6a. Korenchuk acted within his authority when he gave Buck the false report that

petitioner had not complied with the January 2004 directive. 1/7/08 Tr. 47-48; Pet. App. 9a-10a.

Accordingly, the evidence presented at trial was sufficient to allow a reasonable jury to conclude that petitioner's military status was a motivating factor in his termination. The evidence showed that Mulally and Korenchuk harbored anti-military animus, that their animus was a motivating factor in the exercise of their supervisory responsibilities, and that the actions they took as petitioner's supervisors caused his termination. The court of appeals therefore erred in setting aside the jury's verdict in favor of petitioner.

2. The court of appeals also held, as an alternative basis for its judgment, that petitioner would have been fired even "[a]part from the friction caused by his military service." Pet. App. 20a. That holding is directly at odds with the jury's special verdict that respondent had failed to prove that petitioner "would have been discharged regardless of his military status." J.A. 68a. The court of appeals' holding in this regard was based on its erroneous view that Buck had conducted an "investigation," and, "exercis[ing] her independent judgment * * * simply decide[d] that [petitioner] was not a team player." Pet. App. 20a-21a. In reaching that conclusion, the court reasoned that Buck was "not wholly dependent on a single source of information" but instead "conduct[ed] her 'own investigation into the facts relevant to the decision.'" *Id.* at 21a (quoting *Brewer*, 479 F.3d at 918).

In fact, Buck did not conduct a meaningful independent investigation. Instead, she did nothing more than consult with Korenchuk, review petitioner's personnel file, and rely on her recollection of what the court of appeals described as other "past issues" concerning peti-

tioner, none of which had been the subject of discipline. Pet. App. 10a-11a; 1/7/08 Tr. 86-87. Significantly, she failed to take even the simple step of asking petitioner for his side of the story. Pet. App. 20a (noting that Buck "failed to pursue [petitioner's] theory that Mulally fabricated the [January 2004] write-up; [and that] had Buck done this, she may have discovered that Mulally indeed bore a great deal of anti-military animus"). Nor did she interview any other witnesses, such as Sweborg, before deciding to terminate petitioner. *Id.* at 10a-11a.

Buck's mere review of a personnel file was insufficient to break the causal link between Mulally's and Korenchuk's discriminatory motives and petitioner's termination. As the Tenth Circuit reasoned in *BCI Coca-Cola* in response to similar circumstances, review of a pre-existing personnel file cannot "independently" confirm the basis for termination because "[o]bviously the file contain[s] no information about the recent incident" underlying the termination. 450 F.3d at 492-493. Here, petitioner's personnel file contained nothing about the April 20, 2004, incident that precipitated his termination. In any event, because petitioner was terminated for failing to comply with Mulally's January 2004 warning (Pet. App. 10a), Buck's "investigation" obviously did not confirm any reason other than Mulally's warning to justify Staub's termination. See J.A. 74a. The minimal efforts by Buck—which even the court of appeals conceded "could have been more robust" (Pet. App. 20a)—were therefore insufficient to break the causal chain leading from Mulally's and Korenchuk's discriminatory conduct to petitioner's termination, or to undermine the jury's determination that respondent had failed to prove that it would have discharged petitioner regardless of his military service.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2010

AMICUS CURIAE BRIEF

MOTION FILED

JUL 9 - 2010

No. 09-400

IN THE

Supreme Court of the United States

VINCENT A. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION OF THE AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to of the Supreme Court Rule 37(b), The American Association for Justice respectfully moves this Honorable Court to grant leave to file the accompanying Brief of *Amicus Curiae* in this case.

1. Identity and Interest of Amicus Curiae

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, is a voluntary national bar association whose members represent plaintiffs in civil actions, including many who, like Petitioner in this case, seek legal recourse for illegal discrimination in the workplace.

The Question Presented in this case is very similar to that presented in *BCI Coca-Cola Bottling Co. v. EEOC*, Docket No. 06-341, in which AAJ filed an amicus curiae brief. The writ of certiorari in that

case was dismissed pursuant to a motion of the parties. 549 U.S. 1334 (2007).

It remains AAJ's firm conviction that freedom from illegal discrimination is fundamental to the enjoyment of the opportunities offered in a free society. In addition, our society as a whole benefits from the contributions of all its members. To that end, Congress has enacted civil rights laws that seek to eradicate workplace discrimination. Those laws required fair and realistic enforcement by the courts.

2. The accompanying amicus brief is desirable and will assist this Court.

The accompanying *amicus* brief addresses the important question of the legal standard under which a biased supervisor or other employee who exerts some influence over an employment decision may subject the employer to liability under federal anti-discrimination laws. AAJ is confident that the extensive experience of its members in representing

claimants in such actions will be of assistance to this Court.

3. Consent or Opposition to the Motion.

The movant has discussed the motion with counsel for the parties. Petitioner has consented to the filing of the brief. Respondent has refused consent.

CONCLUSION

For the foregoing reasons, the American Association for Justice asks this Court to grant its motion for leave to file the accompanying brief as *amicus curiae* in this case.

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INTEREST OF *AMICUS CURIAE*

The American Association for Justice (AAJ) respectfully submits this brief as *amicus curiae* in support of Petitioner in this case.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. Among those plaintiffs are persons whose civil rights have been violated by employers who take adverse employment actions on the basis of race, ethnicity, religion, gender or other inappropriate ground. AAJ views freedom from illegal discrimination as essential to the enjoyment of the opportunities offered in a free society. Illegal discrimination not only frustrates the individual's right to equal opportunity, it also prevents society from reaping the benefits of contributions by highly qualified individuals.

SUMMARY OF ARGUMENT

Corporate entities act only through their human agents. Those who are ultimately responsible for making employment decisions often must rely on the reports and recommendations of others in the company, some of whom may be acting out of discriminatory motives. This case arises under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which, like Title VII and

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

other civil rights statutes, imposes liability where illegal discrimination is "a motivating factor." This Court's decision in this matter will have a profound impact on a broad spectrum of statutory efforts to eradicate illegal discrimination.

If courts are to faithfully carry out Congress's goal of eliminating workplace discrimination, they must necessarily hold employers accountable for the discriminatory conduct of all the agents who influence an employment decision. The Seventh Circuit's "cat's paw" rule, however, requires proof that a biased non-decisionmaker exerted such a "singular influence" over the nominal decisionmaker that he or she became the decisionmaker in all but the title. If the decisionmaker relied on any other source of information or conducted any independent investigation of the facts, the non-decisionmaker's bias may not be imputed to the employer, and may not even be considered by the jury. This rule is inconsistent with the "motivating factor" standard of liability. It not only tolerates illegal discrimination but rewards it.

The "cat's paw" rule empowers human resource officials, who are rarely independent, to avoid corporate liability by structuring the decisionmaking process so that all adverse employment decisions are made by human resource personnel. Thereafter, no inquiry into the existence of discriminatory intent is required, and no witnesses need be interviewed, including the victimized individual. Even negligent investigations or those conducted in bad faith are sufficient to avoid liability so long as the human resources representative did not rely exclusively upon

information from a biased employee. In order for an employee to prevail, illegal bias must be the *only* factor in the decisionmaking process. No recognized standard of causation imposes this burden on an employee alleging illegal discrimination.

In order to satisfy the Seventh Circuit's standard, corporate investigations need not be fair or independent or exercise reasonable care. To be sufficient to avoid liability, an investigation need not consider 1) disparate treatment, 2) the statements by witnesses, including the effected employee, 3) direct evidence of discriminatory intent, 4) the untruthfulness of the allegations against the effected employee, or 5) statistical disparities. The question in all such cases is not whether the investigation was negligent, whether the investigation was actually independent, or whether the supervisor was motivated by illegal bias. The only question is whether the final decisionmaker lacked discriminatory intent and considered a source of information in addition to the biased employee.

This Court should not indulge in the fiction that corporate human resources personnel are neutral decisionmakers and unaffected by the reports and recommendations of line supervisors and managers. In the real world, the recommendations of managers and supervisors are generally followed. Much like a police department's internal investigation of excessive force complaints, investigation by an employer's human resources personnel is not wholly independent. This Court should not allow the fox to guard the hen house. Enforcement of USERRA and all civil rights statutes requires a truly independent inquiry to determine

whether illegal animus was a motivating factor in the decision to take adverse employment action. Congress has created a comprehensive administrative scheme and ultimately recognized the right to trial by jury to "independently" make the "motivating factor" determination.

The lower court's "cat's paw" rule undermines the administrative scheme and the right to trial by jury. It reduces those fact-finding processes to a simple judicial confirmation that the final decisionmaker lacked illegal bias and considered more than one source of information. Congress never intended to replace a comprehensive administrative scheme and the civil justice system with the self policing efforts of private employers. A rule to the contrary would dramatically alter the enforcement mechanism of the statute.

This Court should instead adhere to recognized concepts of agency and causation. The discriminatory intent of a supervisor should be imputed to the employer where the supervisor influenced or participated in the decisionmaking process to any degree. Recognized principles of agency and this court's precedent have established that a principal is liable for the acts of its agents acting within the scope of employment, even if the agent engages in acts specifically forbidden by the employer. Liability extends to all agents, not only to final decisionmakers.

The application of the "cat's paw" rule is inconsistent with these basic agency principles, and will result in making the enforcement of fundamental civil rights dramatically more difficult.

ARGUMENT

I. THE "CAT'S PAW" RULE IS INCONSISTENT WITH THE CONGRESSIONAL POLICY TO ERADICATE DISCRIMINATION FROM THE WORKPLACE.

Corporate entities act only through their human agents. In the real world, those who are ultimately responsible for making employment decisions often rely on the reports and recommendations of others in the company. To faithfully carry out Congress's goal of eliminating workplace discrimination, courts must necessarily hold employers accountable for the discriminatory conduct of all their agents who influence an employment decision. The decision below fails to carry out Congress's statutory mandate. Instead, it provides a blueprint for corporate employers to insulate themselves from any accountability for workplace discrimination.

Vincent Staub is a member of the United States Army Reserve and was employed by Proctor Hospital as an angiography technologist. Evidence showed that Staub's supervisor (Janice Mulally) and department head (Michael Korenchuk) harbored hostility toward Staub because of his military service and resented having to accommodate his Army Reserve commitments. Whether to fire Staub, however, was not their decision. Instead, they submitted adverse reports to vice president of human resources Linda Buck. Following a report of insubordination, and after consulting Korenchuk, Buck terminated Staub. There was no indication that

Buck herself harbored any anti-military animus. She relied on reports from Mulally and Korenchuk, as well as from other employees. *Staub v. Proctor Hospital*, 560 F.3d 647, 651-55 (7th Cir. 2009). The jury found that Staub's military service was a motivating factor in the decision, that Proctor would not have terminated him but for his military service, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, and awarded $57,640 in damages. 560 F.3d at 655.

The Seventh Circuit reversed, holding that, as a matter of law, Proctor could not be liable for the discriminatory conduct of non-decisionmakers Mulally and Korenchuk under the appeals court's version of the "cat's paw" rule:

> [W]here a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker.

560 F.3d at 656, quoting *Brewer v. Bd. of Tr. of Univ. of Il.*, 479 F.3d 908, 918 (7th Cir. 2007).

Indeed, under the Seventh Circuit view, it is not sufficient that input from biased employees such as Mulally and Korenchuk was a substantial, or even the most important factor in the employment decision. Instead, the non-decider must be shown to have "such power over the nominal decision maker" as to be, in fact, "the true, functional decision maker." *Brewer* at 918. Unless the plaintiff presents

proof of such "singular influence" to the trial court as a threshold matter, "then the court has no business admitting evidence of animus by nondecisionmakers." *Staub*, 560 F 3d at 658. Thus, plaintiffs are deprived of their right to demonstrate to the jurors, who are generally more experienced in detecting veiled workplace discrimination, that, in light of all the evidence, discrimination was a motivating factor in an adverse decision. The lesson for defendants is not to take steps to combat workplace discrimination, but to take steps to design their decisionmaking procedures to evade accountability.

The Congressional purpose underlying the USERRA is "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3). The statute seeks to achieve that purpose by prohibiting discriminatory conduct which is a motivating factor in the decisionmaking process. 38 U.S.C. § 4311(c). Like USERRA, Title VII seeks to achieve its purpose by prohibiting adverse employment actions where discriminatory intent is a motivating factor. 42 U.S.C. § 2000e-2(m). Thus, this Court's decision in this matter will have an impact far beyond USERRA.

The Congressional purpose of the civil rights statutes generally is to eradicate discrimination in the workplace. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court declared:

> The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and

> personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

Id. at 801. *See also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) ("[I]t is important to bear in mind that Title VII is a remedial statute designed to eradicate certain invidious employment practices"); *14 Penn Plaza LLC v. Pyett*, ___ U.S. ___, 129 S.Ct. 1456, 1477 (2009) ("Like Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the ADEA is aimed at "'the elimination of discrimination in the workplace.'" (quoting *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995))); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) ("The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace'" (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979))); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (Congress designed the remedial measures in these statutes to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973))); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) ("We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in

employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.").

The "cat's paw" theory of imputed liability doesn't dispute the existence of illegal discrimination. It relieves the employer from liability despite it. As such, it is inconsistent with the statutory policy of eradicating illegal discrimination. In this case, for example, there is no indication that either Mulally or Korenchuk were disciplined for their illegal conduct. Secure in the knowledge that their personnel recommendations will likely be followed by human resources and that their bias will likely not be imputed to the corporation, there is no reason to believe that their discriminatory conduct will not continue. If Proctor Hospital is allowed to terminate Mr. Staub based in part on the discriminatory conduct of its employees, such conduct will not be deterred, undermining the explicit purpose of Congress.

II. PRINCIPLES OF AGENCY REQUIRE IMPUTING LIABILITY TO THE EMPLOYER WHERE A BIASED NON-DECISIONMAKER CAUSED AN ADVERSE EMPLOYMENT ACTION.

This Court is called upon to determine the circumstances under which the discriminatory intent of a supervisor can be imputed to an employer where the final decisionmaker is without discriminatory intent. The Court should adhere to recognized concepts of agency and causation, informed by the purposes of the statute. The discriminatory intent of a supervisor should be imputed to the employer

where the supervisor influenced or participated in the decisionmaking process to any degree.

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court considered the agency theory to be applied for imputing liability to the employer in cases involving sexual harassment. In discussing the Restatement (Second) of Agency § 219(1), the Court recognized that a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." 524 U.S. at 776, 793.[2] The Court declined to apply that theory of agency only because it was unclear whether a harasser was acting within the scope of employment or on a frolic. Listing examples, the Court clearly indicated that types of discrimination other than

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[2] The Restatement (Third) of Agency § 2.04 (2006) similarly provides that "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment." "An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." Restatement (Third) of Agency § 7.07(2) (2006).

This section of the Restatement (Third) of Agency differs from Restatement (Second) of Agency in that it is phrased in more inclusive terms. Under § 228(1)(c) of the Restatement (Second), conduct is not within the scope of employment unless "it is actuated, at least in part, by a purpose to serve" the employer. The Third Restatement exempts only that "conduct intended to serve no purpose of the employer." *See* Restatement (Third) of Agency § 7.07 comment b.

harassment were within the "scope of employment" theory. *Id.* at 793-801. Also relying upon the Restatement (Second) of Agency, the Court in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), acknowledged that "even intentional torts are within the scope of an agent's employment if the conduct is 'the kind [the employee] is employed to perform,' 'occurs substantially within the authorized time and space limits,' 'and is actuated, at least in part, by a purpose to serve the' employer." *Id.* at 543-44 (quoting Restatement (Second) of Agency § 228(1)). An employee who satisfies these criteria is acting within the scope of employment "even if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results.'" *Id.* at 544 (quoting Restatement (Second) of Agency § 230).[3]

Like harassment, disparate treatment discrimination is a persistent problem in the workplace. This Court has recognized that

> [a]n employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim . . . developments like this occur from time to time in the law of agency."

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[3] The Court in *Kolstad* declined to apply the Restatement rule to impute liability for punitive damages; this case involves only compensatory damages.

Faragher, 524 U.S. at 798.

The Court in *Faragher* declined to impose this burden on the employer, only because "there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment." *Id.* This case does not involve harassment, and the biased supervisor was clearly acting within the scope of employment and not on a frolic or detour. The discriminatory behavior of the non-decisionmaking supervisor is easily anticipated, and should be charged to the employer as one of the costs of doing business.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court recognized vicarious liability where the action of a supervisor "culminates" in tangible employment action. *Id.* at 765. The Court recognized that supervisors without final decisionmaking authority would "cause" tangible employment action by officials higher in the decisionmaking process. "The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the imprimatur of the enterprise, and use its internal processes." *Id.* at 762. Non-harassment discrimination cases necessarily culminate in tangible employment action.

The Court's rulings in *Ellerth* and *Faragher* were heavily dependent upon a finding that harassment was not within the scope of employment. In this case, there is no question that both Mulally and Korenchuk were agents of their employer and

that they were acting within the scope of their employment. Their employer delegated to them the authority to report insubordination to human resources, which is exactly what they did, and they were at all times acting within the employer's control. Whether they were specifically designated to make personnel decisions is irrelevant if they were acting within the scope of employment and their conduct "caused" the harm to Staub. An employer is responsible for the wrongful acts of all its employees, not only those in personnel.

III. LIABILITY SHOULD BE IMPUTED TO THE EMPLOYER WHERE A BIASED SUPERVISOR INFLUENCED OR PARTICIPATED IN THE DECISION-MAKING PROCESS.

USERRA specifically provides for liability where a person's military status is "*a motivating factor* in the employer's action." 38 U.S.C. § 4311(c) (emphasis added). Title VII creates an identical standard for liability. *See* 42 U.S.C. § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

The "cat's paw" standard of "singular influence" required to impute liability to the employer is inconsistent with this plain statutory language.

A motivating factor is one that is not irrelevant to the decisionmaking process. *See Price*

Waterhouse v. Hopkins, 490 U.S. 228 (1989). "[A] person's gender may not be considered in making decisions that affect her." *Id.* at 242. Any factor that influences the decisionmaking process is necessarily not irrelevant and is therefore a "motivating factor" within the meaning of the statute.[4]

Under the Seventh Circuit's "singular influence" standard, employer liability is avoided if the decisionmaker considers information from multiple sources, and if the non-biased source provides information of a non-discriminatory reason for discipline. Under those circumstances, however, the biased supervisor still influences the decisionmaking process and is therefore a motivating factor in the decision to take an adverse action. Only where the investigation by the ultimate decisionmaker completely factors out the information supplied by the biased supervisor can the taint be eliminated and no longer be a motivating factor. *See* Br. for the United States as *Amicus Curiae* in Supp. of the Pet. at 15. Whether and to what extent the information from a biased supervisor is factored out is ordinarily a factual question for a jury to decide. The testimony of a human resources representative that the biased information was not considered is the quintessential testimony from an interested witness,

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[4] In *Gross v. FBL Financial Services, Inc.*, ___ U.S. ___, 129 S.Ct. 2343 (2009), this Court declined to adopt the "motivating factor" standard as applicable to a claim brought under the ADEA, based on material differences from Title VII. *Id.* at 2349. Instead, it adopted a "but for" standard of causation, and implicitly recognized that a "motivating factor" standard is satisfied with evidence of less than "but for" causation.

and is not sufficient to decide the question on a motion for summary judgment. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) ("the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses'").

USERRA creates a defense to liability where "the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. § 4311(c)(1). Title VII contains a similar provision. 42 U.S.C. § 2000e-5(g)(2)(B). This defense is sufficient to allow employers to punish conduct for legitimate reasons even where the decision to take discipline was influenced by a biased supervisor.

Under the Seventh Circuit's standard, it is not sufficient that the biased information be a motivating factor in the decision to take adverse action, it must be the *only* factor. Under no recognized theory must a plaintiff prove that an illegal reason is the only reason for an adverse action.

When Congress enacted Title VII it "specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" *Price Waterhouse*, 490 U.S. at 241 n.7 (Brennan, J., plurality opinion), citing 110 Cong. Rec. 2728, 13837 (1964). Accordingly, courts in ADEA cases routinely instruct juries age need not be the sole

factor in the employment decision. *E.g., Golomb v. Prudential Ins. Co.*, 688 F.2d 547, 550 (7th Cir. 1982) ("[A] successful claimant in an ADEA action need not prove that age was the sole determining factor for the defendant employer's action, but rather that age was a determining factor"); *Faulkner v. Super Valu Stores Inc.*, 3 F.3d 1419, 1426 n.3 (10th Cir. 1993) ("[A] plaintiff need not prove that age was the sole or exclusive motivation for defendant's failure to hire him. Age is a determining factor if a plaintiff would have been hired except for his age").

In *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007), the Ninth Circuit considered the situation where a subordinate employee with illegal bias participated in an investigation that led to an adverse employment action, but an employee without bias made the final decision. *Id.* at 1181. In relevant part, the court rejected a "but-for" standard of causation as too expansive and the "rubber stamp" or "cat's paw" standard as too narrow. *Id.* at 1182.

> We hold that if a subordinate, in response to a plaintiffs protected activity, sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decisionmaking process.

Id. See also Santiago-Ramos v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) ("One method [of showing pretext] is to show that discriminatory comments were made by the key decisionmaker or those in a position to influence the decisionmaker."); *Rose* v. *New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001) (discriminatory remarks made "by her immediate supervisor, who had enormous influence in the decision-making process"); *Abramson* v. *William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001) ("Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate"); *Madden* v. *Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 677 (6th Cir. 2008) ("We have held that when a plaintiff challenges his termination as motivated by a supervisor's discriminatory animus, he must offer evidence of a 'causal nexus' between the ultimate decisionmaker's decision to terminate the plaintiff and the supervisor's discriminatory animus"); *Stacks* v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1322-23 (8th Cir. 1994) (liability found where a biased manager "admitted that he participated in the decisions to suspend and terminate [Plaintiff]"); *Griffin* v. *Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) ("Thus do we join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."). This standard appropriately applies the congressionally mandated "motivating factor" standard.

Viewing the facts in a light most favorable to Mr. Staub, there is substantial evidence to support

the jury's finding that Mulally and/or Korenchuk were biased against Mr. Staub because he was serving in the reserves; that the bias was a motivating factor in their recommendation to terminate Staub; that Buck, at least in part, relied upon their recommendations; and that the same decision would not have been reached without consideration of the influence of Mulally and/or Korenchuk. Whether and to what extent Buck allegedly considered other information is irrelevant; both Mulally and Korenchuk were agents of Proctor and acting within the scope of their employment. Moreover, USERRA does not require that illegal bias be the only reason for adverse action, only that it be a motivating factor. In this case, that standard is clearly satisfied.

IV. THE LOWER COURT'S "CAT'S PAW" RULE WOULD EFFECTIVELY REPLACE CONGRESSIONALLY MANDATED ADMINISTRATIVE REMEDIAL PROCESSES AND THE RIGHT TO TRIAL BY JURY WITH DECISIONS BY CORPORATE HUMAN RESOURCES PERSONNEL.

Congress created comprehensive administrative processes which employees may initiate and exhaust as a prerequisite for filing suit under USERRA or Title VII of the 1964 Civil Rights Act. If the administrative agency finds a violation of the statute, it is authorized to prosecute the claim on behalf of the claimant and provide a make whole remedy. If the administrative agency finds no violation, the claimant is nevertheless authorized to file suit in federal court and demand that a jury

determine the relevant facts. The vindication of fundamental civil rights and need to eradicate discrimination requires an adversary process, detailed discovery, and ultimately a determination by a jury. An investigation conducted by employees in the corporation's human resources department contains none of the safeguards and attributes necessary for the vindication of civil rights.

Congress never intended an employer's own internal inquiry to replace the statutorily mandated administrative process and the civil justice system. Yet the application of the "cat's paw" rule achieves that result. Under that rule, so long as the company's own human resources decisionmaker considers information from more than one source, the decision becomes non-reviewable by either an administrative agency or a federal jury. The "cat's paw" rule is therefore at odds with the enforcement of fundamental civil rights.

A. The USERRA Administrative Scheme Authorizes Investigation by the Secretary of Labor and Prosecution of the Employee's Claim.

Under USERRA a person claiming a violation of the statute "*may* file a complaint with the Secretary [of Labor] . . . and the Secretary *shall* investigate such complaint." 38 U.S.C. § 4322(a)(2)(B) (emphasis added). In reference to the administrative investigation, the Secretary is granted reasonable access to and the right to interview persons with information relevant to the investigation, and reasonable access to any

documents "that the Secretary considers relevant to the investigation." 38 U.S.C. § 4326(a). The Secretary is further granted subpoena power to implement the testimony of witnesses and production of documents. 38 U.S.C. § 4326(b). The investigation must be completed within 90 days. 38 U.S.C. § 4322(f).

"If the Secretary determines as a result of the investigation that the action alleged in such complaint occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter." 38 U.S.C. § 4322(d). If the complaint is not resolved by the Secretary, the Secretary must notify the person of the results of the investigation, 38 U.S.C. § 4322(e), and the aggrieved person may request a referral to the attorney general, who may then appear and prosecute the claim on behalf of the claimant. 38 U.S.C. § 4323(a). If an aggrieved person has chosen not to apply to the Secretary for assistance, has chosen not to request that the Secretary refer the complaint to the Attorney General, or has been refused representation by the Attorney General, "[a] person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer. 38 U.S.C. § 4323(a)(3).

B. The Civil Rights Administrative Scheme Requires Exhaustion of Administrative Remedies.

Many of the federal civil rights statutes require as a prerequisite to suit the exhaustion of administrative remedies including an investigation

by the federal agency charged with enforcement of the statute. A Title VII plaintiff employed in the private sector must file an administrative charge with the EEOC within 180 or 300 days of the last act of discrimination. 42 U.S.C. § 2000e-5(e)(1). If, after investigating, the EEOC finds reasonable cause to believe the charges are true, it undertakes to eliminate the disputed employment practice "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). If the EEOC finds no reasonable cause or if conciliation is unsuccessful, the employee must obtain a right to sue notice, and may then file suit within 90 days. 42 U.S.C. § 2000e-5(f)(1).

In reference to the administrative process, the EEOC is granted broad investigative authority. *See* 29 C.F.R. § 1601.15. The EEOC may accept or require a specific statement from the aggrieved persons, 29 C.F.R. § 1601.15(b), and require a fact-finding conference. 29 C.F.R. § 1601.15(c). Congress grants to the EEOC subpoena power to require the attendance of witnesses, the production of documents, and access to evidence for the purpose of examination and the right to copy. *See* 29 C.F.R. § 1601.16.

The EEOC also has jurisdiction to investigate alleged violations of the ADEA, 29 U.S.C. § 626(a), and the ADA. 42 U.S.C. § 12117(a). Other statutes authorize federal agencies to enforce and investigate alleged violations of federal law within the context of employment. *E.g.*, The Equal Pay Act, 29 U.S.C. § 206(d), the Family and Medical Leave Act (FMLA),

29 U.S.C. § 2616, and the Sarbanes-Oxley Act, (SOX) 18 U.S.C. § 1514.[5]

C. The "Cat's Paw" Investigation Frustrates the Congressionally Mandated Administrative Scheme and Right to Trial By Jury.

By contrast, the "cat's paw" rule relies solely upon the employer's investigation by corporate human resources department personnel. The employer's investigation is sufficient to satisfy the "cat's paw" rule and insulate the employer from liability so long as the decisionmaker considers information from any source other than the biased supervisor, regardless of how biased the supervisor's information or unreliable the other information may be. As conceded by the Seventh Circuit, the employer's investigation need not be "robust" or a "paragon of independence." *Staub*, 560 F.3d at 659.

To satisfy the Seventh Circuit's standard, corporate investigations need not be fair, independent, or free of negligence. Investigations under the "cat's paw" rule are sufficient even though they fail to consider 1) disparate treatment, 2) the statements by witnesses, including the effected employee, 3) direct evidence of discriminatory intent, 4) the untruthfulness of the allegations against the effected employee (pretext), or 5) statistical disparities. Under the "cat's paw" theory, the

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[5] Congress has vested the Department of Labor with broad remedial and investigatory authority to protect whistle-blowers who report fraud by publicly held corporations. *See* 29 C.F.R. § 1980.104.

determination by corporate human resources personnel would be sufficient to insulate the employer from liability even if its factual findings were clearly wrong.[6]

Under the "cat's paw" theory, an employee who is dissatisfied with the employer's "independent" investigation and its decision could still file a charge of discrimination with the agency charged with the statute's enforcement. But the administrative agency's investigation would be limited to determining the identity of the ultimate decisionmaker and the information that person

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[6] Under the "honest belief" rule recognized by the Seventh Circuit, "[t]he reasons for . . . termination are not scrutinized as to whether they were right or wrong, but only 'whether the reason for which the [employer] discharged the [employee] was discriminatory.'" *Balderston v. Fairbanks Morse Engine Div of Coltec Indus.*, 328 F.3d 309, 324 (7th Cir. 2003) (citation omitted). *See also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) ("[C]ourts 'only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless.'") (citation omitted); *Dawson v. Henry County Police Dep't*, 238 Fed. Appx. 545, 549 (11th Cir. 2007) ("The pretext inquiry focuses on the honesty of the employer's explanation; raising a question about the correctness of the facts underlying that explanation without impugning the employer's honest belief, fails to create a triable pretext issue."); *McNary v. Schreiber Foods, Inc.*, 535 F.3d 765, 769-70 (8th Cir. 2008) ("[T]he relevant inquiry is whether the University believed he was guilty of the conduct justifying discharge, . . . Whether they were correct in their surmise that McNary breached company policy is not the issue.).

reviewed. If the ultimate decisionmaker considered information from more than one source, the agency's inquiry is at an end without reaching the merits of the claim even if an illegally biased supervisor influenced the process and was a motivating factor in the decision to take adverse action.

After having received a right to sue notice, the employee could file a Complaint in federal district court. The employer would again argue that ultimate decisionmaker was free of bias, and considered a source of information other than a biased supervisor, who initiated the disciplinary process. If confirmed, those allegations would require dismissal with prejudice without ever reaching the merits of the discrimination claim. Under the "cat's paw" theory, the judgment of corporate human resources about the merits of an employee's discrimination claim is, in effect, *res judicata*.

Much like a police department's internal investigation of an excessive force complaint, an employer's human resources personnel are not unbiased decisionmakers. It would be nothing less than folly to assume the neutrality of an employer's "independent" investigation, and it would be even greater folly to accord its decision binding effect. Cognitive social psychology teaches that once a recommendation has been made, it will tend to function as a prior theory—a tentative hypothesis. As such, it can reasonably be expected to influence the ultimate decisionmaker's judgment in a recommendation-consistent direction, even if the employer conducts its own investigation. This tendency is known as expectancy confirmation bias.

The empirical and theoretical literature on expectancy confirmation bias is vast.[7]

Moreover, many legal scholars seriously question whether employer-developed anti-discrimination policies are effective in preventing discrimination. While courts have developed a comprehensive set of legal rules governing workplace harassment, for example, the incidence of harassment has not changed because employers are only encouraged to adopt rules and not to ensure that harassment is actually prevented. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance In Sexual Harassment Law*, 26 Harv. Women's L.J. 3 (2003).

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[7] *See* Charles G. Lord, *et al.*, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979); Hillel J. Einhorn & Robin M. Hogarth, *Confidence in Judgment: Persistence of the Illusion of Validity*, 85 Psychol. Rev. 395 (1978); Mark Snyder & William B. Swann, Jr., *Hypothesis-Testing Processes in Social Interaction*, 36 J. Personality & Soc. Psychol. 1202 (1978); John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. Personality & Soc. Psychol. 20 (1983) (demonstrating how expectancy confirmation bias leads to the reinforcement of social stereotypes); John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 Amer. Psychologist 867 (1980)(same); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995).

The existence of prophylactic rules don't insure good faith implementation or compliance with those rules.

> [T]he legal regime has overemphasized compliance with prophylactic rules at the expense of effecting real change in preventing the problem of sexual harassment in the workplace. Employers who play a significant role in maintaining a work environment that is either hostile or hospitable to sexual harassment are rewarded for paying lip service to the regime by enacting standard-issue policies and procedures, regardless of whether those efforts actually reduce harassment or compensate victims. Thus, the triumph of form over substance in sexual harassment law occurs.

Id. at 4-5.

Likewise, a legal regime concerning the adequacy of internal investigations for the purpose of finding illegal discrimination will not necessarily diminish the incidence of illegal discrimination, but only insure the adoption of legally mandated employer rules. While enlightened employer rules concerning internal investigations are to be encouraged, those investigations can never be relied upon to eradicate discrimination at the workplace.

Congress never intended to subordinate the fact-finding functions of the EEOC, the Department of Labor, and federal juries to findings by corporate

human resources personnel. Congress never intended to allow the fox to guard the hen house[8].

CONCLUSION

The decision of the Seventh Circuit should be reversed.

Respectfully submitted,

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July 9, 2010

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[8] The Seventh Circuit appears to have taken the cat's paw fable too literally in adopting a rule for imputing liability to a corporation. It is doubtful whether courts should rely upon fables or proverbs as a source of law. Amicus suggests, however, that the more apt adage is that which cautions against allowing the fox to guard the henhouse. That proverb "has been traced back to 'Contre-League' (1589) and is similar to the Latin: 'Ovem lupo commitere' ('To set a wolf to guard sheep'). First attested in the United States in 'Poet's Proverbs' (1924). The proverb is found in varying forms: Don't put the fox to guard the chicken house; Don't let the fox guard the chicken coop; Don't set a wolf to watch the sheep." Gregory Titelman, *Random House Dictionary of Popular Proverbs and Sayings* 64 (2d ed. 2000)

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 9 - 2009
OFFICE OF THE CLERK

No. 09-400

IN THE

Supreme Court of the United States

VINCENT E. STAUB,
Petitioner,

v.

PROCTOR HOSPITAL,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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248 19

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In The

Supreme Court of the United States

No. 09-400

Vincent E. Staub,
Petitioner,

v.

Proctor Hospital,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a membership of approximately 11.5 million working men and women.[1] This case presents the question of when an employer may be held liable under the Uniformed Services Employment and Reemployment Rights Act of

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

1994, 38 U.S.C. § 4301 *et seq.*, (USERRA) for an adverse employment action against a member of the uniformed services that was based in part on the predicate actions of lower level supervisors taken with anti-military animus where the ultimate decision to take the adverse employment action was made by a higher level supervisor without such animus. The AFL-CIO has filed briefs in other cases concerning the appropriate method for proving employment discrimination. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 n. * (2003). The present case is of particular concern for the AFL-CIO because the proof scheme used under USERRA is the same as that used in cases of unlawful discrimination arising under the National Labor Relations Act.

STATEMENT

Vincent Staub was a member of the United States Army Reserve, who until the discharge challenged in this case was employed as an angiography technologist in the diagnostic imaging department of Proctor Hospital. Staub's Reserve duties typically required him to be present for drills and training one weekend per month and two weeks in the summer. JA 32a. Both the head of the department, Michael Korenchuk, and the second in command, Janice Mulally, repeatedly expressed hostility regarding Staub's reserve duty.

When Mulally began setting the schedule for the department in 2000, Staub started to experience difficulty getting the appropriate days off to meet his Reserve duty. Mulally reacted to Staub's requests for a schedule that allowed him time for his Reserve duty by telling him she "didn't want to deal with it," by making Staub use vacation days for that duty, and by scheduling him for extra shifts without advance notice. JA 32a.

On several occasions, Mulally went beyond taking

actions that frustrated Staub's attempts to reconcile his work schedule with his Reserve duty to expressly state her anti-military animus. Mulally referred to Staub's Reserves duties as "bullshit," charged that "everyone else [in the department] ha[d] to bend over backwards to cover [his] schedule for the Reserves," and posted notices on the employee bulletin board soliciting volunteers to cover Staub's shifts on his Reserve duty weekends in a way that created resentment among other employees. JA 33a. Coworkers reported that Mulally was "out to get" Staub, and on one occasion when Mulally met technologists Angie Day and Leslie Sweborg after work for drinks, Mulally complained about the "strain on the[] department" due to Staub's military obligations and asked Sweborg to "help her get rid of him." Sweborg refused. JA 35a.

On several occasions, Staub asked Korenchuk to intervene with Mulally on his behalf, but to little effect. Korenchuk, for his part, also expressed hostility to Staub's Reserves duties, calling it "Army Reserve bullshit" and "a b[u]nch of smoking and joking and [a] waste of taxpayer money." JA 34a.

Hostility to Staub's Reserves duties increased after he returned to the Hospital from 92 days of active duty service in 2003 and intensified further after January 9, 2004, when Staub was notified that he was to be deployed for additional active duty. JA 34a-35a. A deployment would have been costly to the Hospital, because at that time the department only had two angiography technologists and the hospital would have to hire temporary workers during Staub's absence. JA 35a.

Against this background, Staub and Sweborg received a written warning from Mulally on January 27, 2004, for failing to volunteer for work elsewhere in the diagnostic imaging department when they had no angiography

patients. JA 36a. Staub and Sweborg disputed the warning on the ground that hospital policy had not previously required them to report for work elsewhere in the hospital if they had no patients in the angiography unit. Staub and Sweborg also noted that they had learned of the cancellation of a scheduled procedure only at the last minute, which limited their availability to help elsewhere in the department. JA 37a. The warning required Staub and Sweborg to "report to [Korenchuk] or [Mulally] when [they] ha[d] no patients and [the angiography] cases [we]re complete[d]," as well as "remain in the general diagnostic area unless [they] specified" to Korenchuk or Mulally where they were going. JA 37a.

Following the disciplinary notice to Staub, Mulally made a phone call to Staub's Reserve Unit Administrator to see if Staub could be excused from some of his training commitments that summer. JA 37a. The Administrator told Mulally that the training was mandatory and that reservists could not be excused due to work conflicts. Mulally ended the conversation by calling the Administrator an "asshole" and hanging up the phone. *Ibid.*

Thereafter, on April 2, 2004, Angie Day, who had since resigned from the Hospital, returned for a meeting with Korenchuk (department head), Linda Buck (vice president of human resources), and R. Garrett McGowan (chief operating officer). JA 38a. As mentioned, Day was present when Mulally tried to convince Sweborg to help Mulally get rid of Staub. At the April 2 meeting, Day told the group of Hospital managers that she had trouble working with Staub and that he was "absent . . . from the department." *Ibid.* In response to Day's complaints, Korenchuk was advised to "put together a plan for addressing [Staub]'s behavior." JA 73a.

On April 20, Staub and Sweborg had completed their

work in the angiography department at midday. They reported to Korenchuk's office, but finding him absent, they left a voice mail informing him that they were going to lunch and went to the cafeteria. JA 39a. When they returned a half-hour later, Korenchuk immediately escorted Staub to the human resources office where Buck informed Staub that he was discharged. *Ibid.* Apparently, Korenchuk had already informed Buck that in the face of the January 27 warning Staub had been absent from the department without informing Korenchuk or Mulally, and Buck had already decided to terminate Staub. *Ibid.* Sweborg, who was also subject to the January 27 warning and who had accompanied Staub to lunch on April 20, was not subjected to any discipline. *Ibid.* Staub filed a grievance challenging his discharge on the ground that Mulally bore animus against him due to his military service, but Buck did not investigate that allegation. JA 40a.

Staub brought suit against Proctor Hospital alleging that his discharge violated the anti-discrimination provisions of USERRA. Following a trial, the jury specifically found both that Staub "proved by a preponderance of the evidence that [his] military status was a motivating factor in the [Hospital's] decision to discharge him" and that the Hospital failed to "prove[] by a preponderance of the evidence that [Staub] would have been discharged regardless of his military status." JA 68a. The Seventh Circuit reversed on the ground that Staub had failed to prove that Mulally and Korenchuk had "exercised singular influence" over Buck. In this regard, the Seventh Circuit observed that "Staub faced an uphill battle in his USERRA discrimination suit," because, in that court's view, Staub had the burden of "show[ing] that the *decisionmaker* [, i.e., Buck,] harbored animus and relied on that animus in choosing to take action." JA 41a (emphasis in original).

SUMMARY OF ARGUMENT

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) prohibits employment discrimination against persons who serve in the uniformed services. USERRA specifies that an employer shall be considered to have engaged in prohibited discrimination if a person's service is a motivating factor in an adverse employment action. The implementing regulations provide that an employee can establish prohibited discrimination by showing that his service was one of the reasons for his employer's adverse employment action.

The evidentiary scheme for proving employment discrimination under USERRA was derived from the scheme developed by the National Labor Relations Board in applying the anti-discrimination provisions of the National Labor Relations Act. Applying that scheme, the NLRB has frequently considered the question of when an employer should be held liable for the discriminatorily motivated actions of lower level supervisors that form the basis for a decision to take adverse employment action made by a higher level supervisor who has no personal discriminatory motive. The NLRB decisions hold that the employer is liable for discrimination where an adverse employment action is based in whole or in part on the discriminatorily motivated actions of lower level supervisors. Under the NLRA evidentiary scheme, carried over in USERRA, the employer can escape liability in that circumstance by proving that it would have taken the adverse employment action without regard to the employee's protected status.

In this case, Staub presented ample evidence that the decision of Proctor Hospital's vice president to discharge him was substantially based on the discriminatorily motivated predicate actions of two lower level supervisors. The Seventh Circuit held that this showing was insufficient to establish a discrimination claim under USERRA

and that, instead, Staub needed to prove that the vice president "harbored animus and relied on that animus in choosing to take action." The Seventh Circuit's rule substitutes a "sole cause" requirement for the substantial cause requirement provided for by the text of USERRA and the implementing regulations.

ARGUMENT

The instant case involves a recurrent fact pattern in cases brought under various federal laws that prohibit employment discrimination. An employer's lower level supervisor, acting within the scope of his or her employment and out of a discriminatory motive, takes some predicate action, such as reporting an infraction of company rules, that could constitute grounds for discharging or otherwise disciplining an employee. A higher level company official, acting on the basis of that discriminatory predicate action but without any personal discriminatory motive, disciplines or discharges the employee. The employee responds by bringing a claim against the employer for violating the anti-discrimination law.

Under the National Labor Relations Act – the longest standing of the federal employment discrimination laws – the settled rule is that, in this recurrent situation, the employee has a claim against the employer. *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117 (6th Cir. 1987), explains the NLRA rule:

> Section 8 of the Act states that the 'employer' may not engage in unfair labor practices. 29 U.S.C. § 158(a). '[A]ny person acting as an agent of an employer, directly or indirectly . . .' comes within the definition of that term. 29 U.S.C. § 152(2). [Thus, when a person] qualifies as a 'supervisor' under the Act, 29 U.S.C. § 152(11), . . . the company will be liable for the consequences of his actions. * * *

> "[It follows that] 'a supervisor's unlawful, anti-labor motivation in [taking a predicate action] leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus. Thus, the company is deemed to possess the unlawful animus.' *JMC Transport, Inc. v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985) (citations and footnote omitted)."

As we now show, the anti discrimination provision of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.*, (USERRA), and the Secretary of Labor's regulations implementing that provision are modeled on the NLRA anti-discrimination provision as elaborated in the line of NLRB cases approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and under that evidentiary scheme, Staub's USERRA discrimination claim against Proctor Hospital – like the parallel NLRA discrimination claim in cases such as *Grand Rapids Die Casting* – is meritorious.

I. USERRA prohibits "[d]iscrimination against persons who serve in the uniformed services" by broadly providing:

> "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. § 4311(a).

Of critical importance for the instant case, USERRA goes on to specify:

> "An employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the per-

> son's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. § 4311(c).

By expressly imposing liability where anti-military animus is "a motivating factor in the employer's action," "Congress disavowed the sole-motivation requirement inferred by *Monroe* [*v. Standard Oil Co.*, 452 U.S. 549 (1981),] and its progeny" from the anti-discrimination provisions of the Veterans Reemployment Rights Act of 1968, which were superseded by USERRA. *Gummo v. Village of Depew*, 75 F.3d 98, 105 (2d Cir. 1996).

The Secretary of Labor has authority to "prescribe regulations implementing the provisions of [USERRA] with regard to the application of [USERRA] to States, local governments, and private employers." 38 U.S.C. § 4331(a). Exercising this authority, the Secretary prescribed the following regulation delineating "the burden of proving discrimination or retaliation in violation of USERRA":

> "The individual has the burden of proving that a status or activity protected by USERRA was *one of the reasons* the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway." 20 C.F.R. § 1002.22 (emphasis added).

In promulgating this regulation, the Secretary explained that, "[u]nder this structure, in order to establish a case of employer discrimination" a claimant must prove the following three "elements of a violation":

> "[i] membership in a protected class (such as past, present or future affiliation with the uniformed services; [ii] an adverse employment action by the employer or prospective employer; and [iii] a casual relationship between the claimant's protected status and the adverse employment action (the 'motivating factor')." 70 Fed. Reg. 75246, 75250 (Dec. 19, 2005).

With regard to the third element, the Secretary emphasized that "a claimant need not show that his or her protected activities or status was the sole cause of the employment action." 70 Fed. Reg. at 75250. To the contrary, "in order to establish a case of employer discrimination" under USERRA, a claimant needs to show "a casual relationship between the claimant's protected status and the adverse employment action" but "need *not* show that his or her protected activities or status was the sole cause of the employment action." *Ibid.* (emphasis added). Thus, "the person's activities or status need be *only one of the factors*" causing the adverse employment action. *Ibid.* (emphasis added).

As the Secretary of Labor has explained, in drafting USERRA's anti-discrimination provision, "Congress intended that the evidentiary scheme set forth by the United States Supreme Court in *NLRB v. Transportation Management Corp.* 462 U.S. 393, 401 (1983), apply to the analysis of violations under USERRA." 70 Fed. Reg. at 75250. "Under that scheme, a claimant carries his burden of proving a prima facie case of discrimination by showing, by a preponderance of the evidence, that his protected status was 'a substantial or motivating factor in the adverse [employment] action'; but the employer may nonetheless escape liability by showing, as an affirmative

defense, that it would have made the same decision without regard to the employee's protected status. *Transportation Management*, 462 U.S. at 401." *Gummo*, 75 F.3d at 106. *See Transportation Management*, 462 U.S. at 401 ("the Board's decisions . . . have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus").

II. In applying "the evidentiary scheme" approved by this Court in *Transportation Management* – and incorporated in USERRA – the National Labor Relations Board has had considerable experience in dealing with the problem presented by this case, namely when an employer should be held liable for discriminatory actions of lower level supervisors that contribute to a decision by a higher level supervisor, who has no personal discriminatory motive, to take adverse employment action.[2] In applying that scheme, the NLRB has been careful not "to adopt a rule that would permit the company to launder the 'bad' motives of certain of its supervisors" by relying upon the decision of "a neutral superior." *Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982). Thus, in many cases applying that scheme, employers have been found to have violated the NLRA for adverse employment actions that were caused in part by the discriminatorily motivated predicate acts of lower level supervisors "even though the management official who ultimately fired the complainant was unaware of that employee's union activity." *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d at 118. *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312

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[2] The NLRB is familiar with the "cat's paw" fable. *See Brown Shoe Co.*, 1 NLRB 803, 828 (1936). But the Board has wisely refrained from employing that metaphor in addressing the problem of when a lower level supervisor's unlawfully motivated actions can serve as the basis for employer liability.

F.2d 529 (3d Cir. 1962), applies that evidentiary scheme to a factual situation that is essentially identical to that presented here.

In *Allegheny Pepsi-Cola Bottling*, an anti-union supervisor "reported to [the] company president" that a key union supporter "had misused a company-leased panel truck on two occasions." 312 F.2d at 531. Relying on that report, the company president "then ordered [the union supporter] dismissed." *Ibid.* The Board found that the supervisor "was discriminatorily motivated in making his report and that because of this, [the union supporter's] discharge violated the Act," even though the company president "himself was not so motivated in ordering the discharge." *Ibid.* Since the person who reported the union supporter was "a supervisor within the meaning of the Act" and "the report he made to [the company president] was obviously within the scope of his employment" and unquestionably "the cause of [the union supporter's] discharge," "the only issue was whether [the supervisor] was discriminatorily motivated in making the report." *Ibid.* citing *Federal Tool Corp.*, 130 NLRB 210, 220-21 (1961) (superintendent's decision to lay off union supporter based on supervisor's negative evaluation that was influenced by antiunion animus violates the NLRA, even though the superintendent did not know of the laid off employee's union activity). Finding that the evidence showed the supervisor was so motivated, the Board found the employer guilty of an unfair labor practice. *Ibid.* As the Third Circuit observed in enforcing the Board's decision, "To rule otherwise would provide a simple means for evading the Act by a division of corporate personnel functions." *Ibid.*

The principle reflected in these decisions applying the NLRA anti discrimination provision is that "a supervisor's unlawful, anti-labor motivation in [taking a predicate

action] leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus." *Grand Rapids Die Casting*, 831 F.2d at 117 (citation and quotation marks omitted).

III. The lesson to be drawn from the foregoing is that a prima facie case of discrimination under USERRA can be proven by showing a causal connection between a discriminatorily motivated action by a lower level supervisor and the decision of a higher level employer official to take adverse employment action.[3] As the Tenth Circuit succinctly stated the matter, in such a case, "the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487 (10th Cir. 2006), *cert. dismissed*, 549 U.S. 1334 (2007).[4]

That is so, because "in order to establish a case of employer discrimination" under USERRA, a claimant needs to show "a casual relationship between the claimant's protected status and the adverse employment action" but "need not show that his or her protected activities or status was the sole cause of the employment action." 70 Fed. Reg. at 75250. Where a supervisor takes

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[3] Like the NLRA, 29 U.S.C. § 152(2), USERRA defines "the term 'employer'" to include, not only "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment," but also "a[ny] person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. § 4303(4)(A).

[4] BCI Coca Cola Bottling was decided under Title VII of the Civil Right Act, which, like USERRA, requires that a claimant show that a proscribed animus was "a motivating factor" for the adverse employment action. 42 U.S.C. § 2000e-2(m)

an action "within the scope of his employment" that is "the cause of [a USERRA-protected employee's] discharge," "the only issue [i]s whether [the supervisor] was discriminatorily motivated in [t]aking the [action]." *Allegheny Pepsi-Cola Bottling*, 312 F.2d at 531. Under USERRA, "a supervisor's unlawful, anti-[military] motivation in [taking an action] leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus." *Grand Rapids Die Casting*, 831 F.2d at 117 (citation and quotation marks omitted).

In the instant case, the decision to discharge Staub was made by Linda Buck, Proctor Hospital's vice president of human resources. "According to the written notice [issued by Buck], Staub was discharged for failing to heed the earlier warning instructing him to report to Korenchuk whenever he had no more work in the angio department and otherwise to remain in the general diagnostics area." Jt. App. 39a. Buck testified that "[w]ithout the January 27 write-up [leading to the earlier warning], Day's April 2 complaint, and the event of April 20 . . . she would not have fired Staub." *Ibid.* Staub presented ample evidence that the "January 27 write-up" on which the "earlier warning" was the result of anti-military bias on the part of Staub's immediate supervisor Janice Mulally and of department head Michael Korenchuk. And the event of April 20 – leaving a recorded message for Korenchuk explaining that Staub was at lunch when he was unable to find Korenchuk to report in person – was not a violation of the January 27 instruction at all, as demonstrated by the fact that Sweborg, who was also subject to that instruction and who accompanied Staub to lunch that day, was subject to no disciplinary action.

By Buck's own testimony, then, her decision to discharge Staub was caused by the earlier discriminatorily

motivated actions of Staub's immediate supervisor and the department head. The fact that Buck herself may not have harbored the anti-military animus that motivated the predicate actions of the lower level supervisors does not refute Staub's showing that the unlawfully motivated actions of those supervisors was "a motivating factor in the employer's action." 38 U.S.C. § 4311(c). Thus, Staub submitted sufficient evidence to satisfy his "burden of proving that a status or activity protected by USERRA was one of the reasons the employer took action against him." 20 C.F.R. § 1002.22.

The Seventh Circuit held that it was insufficient for Staub to establish that Buck's decision to discharge him was based on the discriminatory actions of his immediate supervisors. JA 41a. Rather, that court imposed on Staub the burden of "show[ing] that the *decisionmaker*[, i.e., Buck,] harbored animus and relied on that animus in choosing to take action." *Ibid.*

The Seventh Circuit's ruling is squarely in conflict with the Secretary of Labor's implementing regulations, which provide that the claimant's burden is to show that anti-military animus was "one of the reasons the employer took action against him." 20 C.F.R. § 1002.22. Under the evidentiary scheme adopted by those regulations, it is sufficient that Korenchuk and Mulally's discriminatory actions were "a substantial or motivating factor in the adverse [employment] action." *Transportation Management*, 462 U.S. at 401. Contrary to the Seventh Circuit, it is not necessary to show that the discriminatory actions of these lower level supervisors "exercised singular influence" over Buck, JA 46a, making the actions of the lower level supervisors, in effect, "the sole cause of the employment action," 70 Fed. Reg. at 75250. To the contrary, under the evidentiary scheme enacted by Congress, "a supervisor's unlawful, anti-labor motivation

in [taking a predicate action] leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus." *Grand Rapids Die Casting*, 831 F.2d at 117 (citation and quotation marks omitted).

As the circumstances of this case amply demonstrate, the rule adopted by the Seventh Circuit "would permit the company to launder the 'bad' motives of certain of its supervisors" by hiding behind the decision of "a neutral superior." *Boston Mutual Life*, 692 F.2d at 171. Such an approach "would provide a simple means for evading the Act by a division of corporate personnel functions." *Allegheny Pepsi-Cola Bottling*, 312 F.2d at 531. For precisely that reason, that approach was rejected by Congress in drafting USERRA and by the Secretary of Labor in issuing regulations implementing the anti-discrimination provisions of that statute.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

MOTION FILED

SEP 9 - 2010

No. 09-400

IN THE

Supreme Court of the United States

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA OUT OF TIME

To the Honorable Court, through undersigned counsel, comes the Chamber of Commerce of the United States of America for leave to file its *amicus curiae* brief in support of respondent out of time.

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Amicus curiae respectfully submits this brief in support of Respondent, pursuant to Supreme Court Rule 37.3.[1] *Amicus* urges the Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF INTEREST

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the world's largest federation of business, trade and professional organizations in the United States. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations. The Chamber has members of every size, in every sector and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing employment law issues, including, most recently, in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009); *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amicus curiae*, and their consent letters are on file with the Clerk's Office.

618 (2007); and, in cases directly relevant to the issues presented here, *BCI Coca-Cola Bottling Co. v. EEOC*, 549 U.S. 1334 (2007), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

The Chamber's members have a substantial interest in the proper standards for imposing liability under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et. seq.*, particularly as the interpretation of this statute may affect the interpretation of other federal statutes addressing employment discrimination. This case presents the question of whether and when an employer is subject to liability for unapproved, biased acts of a renegade employee. The petitioner in this case seeks to establish a strict liability regime that would penalize employers for any discriminatory acts that arguably have a factual connection to an adverse employment action. But employers are not social insurers and should not be held liable for every frolic and detour of their employees. Rather, as the Chamber explains below, consistent with common law principles of agency and causation, adjusted appropriately to reflect the policy concerns of the organic laws in issue, the Court should hold that employers are liable only for discriminatory exercises of delegated authority that actually and proximately cause an adverse employment action; the Court should further hold that proximate cause is lacking where the actual employment decision is made by a non-biased actor guided by and adhering to reasonable anti-discrimination policies and procedures.

SUMMARY OF ARGUMENT

The question in this case is whether respondent, Proctor Hospital, may be held liable under USERRA as an "employer" for terminating petitioner, Vincent Staub, "on the basis" of his military status. Although the court below did not use the correct framework to analyze this question, it nevertheless correctly answered that question in the negative.

I. This Court's jurisprudence generally establishes that, to hold an employer liable for an allegedly biased act of one of its employees, the plaintiff must show both (1) that the employer is legally responsible for the act under applicable agency law principles; and (2) that the allegedly biased act actually and proximately caused the adverse employment action in issue. These principles should specifically apply in USERRA cases.

A. Employers should not be liable for all frolics and detours or other unauthorized conduct of their employees. Rather, an employer should be responsible only for actions that it has delegated authority to an employee to take.

At common law, an employer could be held vicariously liable for torts of an employee where the employee was "aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). This Court has made clear, however, that the "aided by the existence of the agency relation" standard cannot be applied literally in the employment discrimination context, because it would subject employers to overly broad liability and undermine compliance with employment discrimination laws. *See Burlington*,

524 U.S. at 760; *Faragher*, 524 U.S. at 797; *Kolstad*, 527 U.S. at 544.

Accordingly, under the Court's cases, vicarious liability is appropriate in federal employment cases only where, among other things, the plaintiff proves that an allegedly biased action involved the exercise of official delegated authority and thus properly can be treated as an official or company act. *See Burlington*, 524 U.S. at 762; *Faragher*, 524 U.S. at 805; *Kolstad*, 527 U.S. at 545. An official or company act certainly occurs when a biased employee effectively makes the final decision that constitutes the adverse action for which the plaintiff sues. In such circumstances, the biased employee is acting on delegated authority, and the biased decision is effectively ratified and adopted by the employer as its own.

In contrast, where employment actions do not involve mere rubberstamping but rather reflect independent decisions of agents with delegated authority to take the acts in question, vicarious liability may be properly imposed for unlawfully motivated actions that cause those independent decisions only if, among other things, the unlawfully motivated actions are themselves official exercises of delegated authority. Acts *not* involving the exercise of delegated authority are not acts of the employer; they do not carry with them an "imprimatur of the enterprise"; and they should not subject employers to vicarious liability.

B. Even acts of delegated authority do not allow vicarious liability to be imposed, however, if they are not the actual and proximate cause of the ultimate adverse employment action. Actual causation is

factual causation; proximate causation is legal causation.

Not surprisingly, in construing various federal statutes, this Court has long embraced both actual and proximate causation principles. The Court has held that concepts of actual and "proximate causation" limit liability under a variety of statutory schemes, including RICO, the FTCA, and the Clayton Act. This Court's cases addressing employment discrimination also embrace such actual and proximate causation principles. So do persuasive employment law decisions in the lower courts.

C. These agency and causation principles should equally apply to USERRA cases. USERRA's definition of "employer" explicitly references agency principles by applying only to a: "person . . . that has *control* over employment opportunities" or a "person . . . to whom the employer has *delegated* the performance of employment-related responsibilities." 38 U.S.C. § 4303(4)(A)(i) (emphases added). USERRA's text also embraces causation principles by applying only to employment actions made "on the basis of [plaintiff's] membership" in a uniformed service. 38 U.S.C. § 4311(a). Nothing in the statutory scheme suggests that the agency and causation principles applicable under other federal employment laws do not apply in USERRA cases.

II. Under these agency and causation principles, the decision below is correct. Mullaly and Korenchuk may have been exercising delegated authority for which respondent is properly responsible. But their acts were not the proximate cause of the adverse employment action in issue.

A. Under applicable proximate causation principles, there should be no liability where a non-biased decision-maker made the actual decision and engaged in an independent evaluation of the matter. The policies of USERRA—like the policies of other employment discrimination statutes—aim to encourage employers to create and follow reasonable anti-discrimination policies and procedures. Where an employer has done so, these policies are not well served by imposing liability on the employer.

Consistent with these principles, lower federal courts have repeatedly found proximate cause lacking where a non-biased decision-maker made the actual decision in issue and engaged in an independent evaluation of the matter—even matters that are initially initiated or influenced by the act of a biased employee. The cases indicate that receiving input from non-biased sources and/or examining the evidence independently establishes a lack of proximate causation. Likewise, where a decision-maker gives an employee an opportunity to present his side of the story, courts also hold that proximate cause is lacking. These cases recognize that the policies of the underlying statutes would be disserved by imposing liability in these various circumstances.

B. The record here establishes that Buck, the ultimate decision-maker, was non-biased; and, as the record shows, she acted responsibly in making a determination that Staub had to be terminated. These facts suffice to establish that any alleged bias of Mullaly and Korenchuk was not the proximate cause of Buck's decision to terminate Staub.

Before firing Staub, Buck made her own evaluation of the matter. *First*, even before receiving the

recommendation to fire Staub, Buck had received numerous negative reports about Staub in the course of the preceding two years from Staub's non-biased supervisors, managers and colleagues. *Second*, Buck evaluated Staub's side of the story. *Third*, Buck effectively assessed the January 27 incident twice. *Fourth*, Buck reviewed Staub's personnel file, which contained his evaluations indicating his noncompliance with conditions for his return after his 1998 firing.

The Seventh Circuit thus reached the correct conclusion here in holding that respondent is not liable. There is no serious dispute that the allegedly biased supervisors had been delegated authority to report to Buck about Staub. But there is no proximate causation. Although the Seventh Circuit did not engage in an explicit proximate causation analysis, it properly recognized that Buck was not herself biased and acted in a responsible manner in evaluating Staub's personnel problems and in terminating him. Those facts suffice to defeat proximate causation.

III. Although the Government and Petitioner appear to embrace the agency-causation principles framework, their treatment of proximate causation is legally and factually unfounded. *First*, they confuse actual and proximate causation principles: That an independent investigation shows "the adverse action would have been taken anyway" is an actual causation issue, not a proximate causation issue. The role of proximate causation is to preclude liability even where actual causation exists, because of the attenuation between that cause-in-fact and the adverse action in issue, and because of other

statutory policies that are better served by rejecting liability arguments in the particular context. *Second*, the Government ignores and misconstrues crucial facts demonstrating that Buck acted in a responsible manner before firing Staub and thus that there is no proximate causation.

ARGUMENT

USERRA commands that "[a] person who is a member of . . . a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership." 38 U.S.C. § 4311(a). USERRA defines an "employer" that could be liable for such actions as "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities . . . ." 38 U.S.C. § 4303(4). There is no issue here concerning whether respondent is an "employer"; it plainly is. Rather, the question here is whether "a person . . . to whom [the] employer has delegated the performance of employment-related responsibilities" "denied [petitioner] retention in employment" "on the basis of . . . membership" in "a uniformed service." Although the court below did not fully apply the correct legal framework, in analyzing this question it nonetheless correctly held that liability was not legally appropriate in this case, because the alleged discriminatory acts did not proximately cause the ultimate challenged employment action.

I. FOR AN EMPLOYER TO BE HELD LIABLE UNDER USERRA, A PLAINTIFF MUST ESTABLISH BOTH THAT THE EMPLOYER IS LEGALLY RESPONSIBLE UNDER APPLICABLE AGENCY LAW PRINCIPLES FOR THE ALLEGED DISCRIMINATORY ACT AND THAT THE ALLEGED UNLAWFUL ACT ACTUALLY AND PROXIMATELY CAUSED THE ADVERSE EMPLOYMENT ACTION IN QUESTION

As explained below, whether "a person . . . to whom [the] employer has delegated the performance of employment-related responsibilities" "denied [the plaintiff] retention in employment" "on the basis of . . . membership" in "a uniformed service" raises two distinct sub-issues—an agency issue and a causation issue. As to agency, the sub-question is whether applicable agency-law principles make the employer legally accountable for an allegedly discriminatory act. As to causation, the sub question is whether the alleged discriminatory act was both an actual and a proximate cause of the adverse employment action at issue. As the applicable statutory language and this Court's cases confirm, both agency and causation are necessary conditions for imposition of vicarious liability.

A. The Plaintiff Must Show That, Under Applicable Agency Law Principles, The Employer Is Legally Responsible For The Alleged Discriminatory Act

This Court's cases demonstrate that, even where a biased act leads to an adverse employment action, liability for the employer does not always follow. Rather, a fundamental precondition for liability is

that, under applicable agency principles, the act is an "official" or "company" action.

1. For example, in the context of suits against municipalities under Sections 1981 and 1983, the Court has refused to impose *respondeat superior* liability for municipalities. The Court has instead held that vicarious liability may be imposed only for actions taken pursuant to official municipal policy. *See Monnell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978) (section 1983); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736 (1989) (section 1981).

In cases arising under Section 1981, the Court has similarly held that employers may not be held vicariously liable for a union's discriminatory operation of a hiring hall. *See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 378 (1982). The Court reasoned that holding an employer vicariously liable for a union's discriminatory actions would be "alien to the fundamental assumptions upon which the federal labor laws are structured," because the union is not a legal agent of the employer. *Id.* at 393-95.

The Court's cases construing Title VII have likewise held that liability may only be imposed on an employer for official acts of its agents. As the Court explained in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), "Congress's decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."

2. Subsequent decisions of the Court have further explained that liability rules in federal

employment statutes find only their "*starting* point" in common law agency principles. *Faragher*, 524 U.S. at 802 n.3 ("our obligation here is not to make a pronouncement of agency law in general or to transplant § 219(2)(d) into Title VII"). The Court has held that such common law principles of agency must be "adapt[ed] . . . to the practical objectives" of the applicable statutory laws. *Id.*

As this Court has explained, the doctrine of "*respondeat superior*, as traditionally conceived . . . enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant." *Gen. Bldg. Contractors*, 458 U.S. at 392 (citing RESTATEMENT (SECOND) OF AGENCY §§ 215-216, 219)). Under these principles, "[a]n employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment." *Burlington*, 524 U.S. at 756; RESTATEMENT (SECOND) OF AGENCY § 229(1) (1958). Furthermore, in certain "limited circumstances," general principles of agency law allow imposition of vicarious liability where an employee acts outside of the scope of the employment, including where "(d) the servant . . . *was aided in accomplishing the tort by the existence of the agency relation*." *Burlington*, 524 U.S. at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)) (emphasis added). *See also* Petitioner's Brief ("Pet.") 23 (same).

As courts have recognized, however, it is not legally appropriate to apply the "aided by the agency relation" standard too literally in the context of employment discrimination laws:

> [I]t is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is always "aided in accomplishing" the tort. Because the exception is not tied to the scope of employment but, rather, to the existence of the employment relation itself, the exception strays too far from the rule of *respondeat superior* employer nonliability.

Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 226 (Mich. 2006). For this reason, courts have frequently declined to extend agency principles as far as the "aided in the agency relation" standard would extend them. *See, e.g., id.* at 234 n.11 (Young, J. concurring); *Groob v. Keybank*, 843 N.E.2d 1170, 1179 (Ohio 2006).

This Court similarly has indicated that agency law principles applicable in federal employment discrimination cases do not extend to acts merely because they were "aided" by "the existence of the agency relation." *Burlington*, 524 U.S. at 760. Because a literal application of the "aided in the agency relation" test in the employment context would impose too broad a liability, the Court has concluded that imposition of liability "requires the existence of something more than the employment relation itself." *Id.* (emphasis added). *See also* Brief Of The United States As Amicus Curiae Supporting Petitioner ("SG") 15 (same).

For example, in the sexual harassment context, the Court has held that employers may be vicariously

liable "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Faragher*, 524 U.S. at 808. Employers may also be liable "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 807; *Burlington*, 524 U.S. at 765. *See also* SG 16 (same). However, even in cases involving supervisor misconduct, vicarious liability is not allowed where: "(a) . . . the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington*, 524 U.S. at 765. The Court so concluded by "accommodat[ing] the agency principles . . . as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Id.* at 764.

Relatedly, in the context of determining the availability of punitive damages under Title VII, the Court has similarly declined to apply literally the "aided in the agency relation" standard, and has held that it is necessary "to modify these principles to avoid undermining . . . the prophylactic goals underlying Title VII." *Kolstad*, 527 U.S. at 542-43, 545. The Court specifically held that there is no vicarious liability in the punitive damages context where "decisions of managerial agents are contrary to the employer's good faith efforts to comply with Title VII." *Id.*

3. The Court's cases show that, as a threshold matter, it is important to distinguish among the

actors from whom the employer may receive input in making an adverse employment decision. In deciding to terminate an employee, the manager decision-maker may adopt the recommendation of another manager. The decision-maker may also receive a report on an employee's performance from an intermediate supervisor, who is not empowered to recommend a particular action or to take any official action. The decision-maker may be made aware of an informal hallway discussion regarding an employee's performance or receive an anonymous message. The actions of an employer's employees span a broad spectrum and, both because of their variety and their differing relationship to delegated authority (or lack thereof), they do not all properly trigger vicarious liability.

Rather, the Court's employment jurisprudence suggests that vicarious liability may be properly imposed on an employer only for "official acts" that "become . . . the act of the employer," "a company act." *Burlington*, 524 U.S. at 762. The most obvious class of such acts is "when a supervisor takes a tangible employment action against the subordinate." *Id.* at 760-61. It follows that an employer should be vicariously liable for managerial actions that involve no independent assessment but merely rubberstamp discriminatory actions of subordinate employees who are in effect *de facto* decision makers. An "official" act is committed by a biased employee when he is effectively allowed to make the final decision that adversely affects the plaintiff. Holding an employer vicariously liable is appropriate because "the [employee] and the employer merge into a single entity," *id.* at 762, and the biased employee's act becomes the "official act." *See also* RESTATEMENT

(SECOND) OF AGENCY § 219, cmt. a (1958) ("The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm.").

In contrast, when employment actions do not involve mere rubberstamping but rather reflect independent decisions of agents with delegated authority, vicarious liability may properly be imposed (for unlawfully motivated actions that actually and proximately cause independent decisions) only where the unlawfully motivated act involves an exercise of delegated authority. In elaborating on the scope of the "aided by the agency" standard, the Court in *Burlington*, 524 U.S. at 762-63, cited *Shager v. Upjohn Co.*, 913 F.2d 398, 405-06 (7th Cir. 1990), a case where the plaintiff was formally fired by the Career Path Committee, but which allegedly acted on a report by a biased intermediate supervisor. The *Shager* court noted that, if the committee "was not a mere rubber stamp, but made an independent decision to fire Shager," there would be "no ground for finding willful misconduct by" the employer. *Id.* at 406. Thus, the "official" responsibility for the adverse employment action would lie with, and would be exercised by, the committee—and not by the employee with the alleged bias.

This Court's decisions regarding the necessary conditions for imposition of punitive damages in Title VII cases also recognize this distinction between unauthorized employee actions and official actions. *See, e.g., Kolstad*, 527 U.S. at 542-43. Courts of appeals have followed this Court's reasoning and repeatedly recognized this distinction as well. *See, e.g., Muegge v. Heritage Oaks Golf & Country Club,*

Inc., 209 F. App'x 936, 941 (11th Cir. 2006) (per curiam); *Booker v. GTE.net LLC*, 350 F.3d 515, 519 (6th Cir. 2003); *Jones v. Baisch*, 40 F.3d 252, 254-55 (8th Cir. 1994) (per curiam). *See also Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 287-88 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005).

Correlatively, acts *not* involving the exercise of the employer's delegated authority do not carry with them an "imprimatur of the enterprise" and are not properly the basis for imposing vicarious liability on the employer. For example, an employer may take an adverse employment action based upon a negative recommendation about the employee from his prior employer, who provides false negative information because of racial bias. However, despite the existence of actual causation, the current employer would not be vicariously liable because he is not legally responsible for the acts of the prior employer. Or, where an employee's fellow employee brings to the decision-maker's attention a conversation overheard in the hall involving the employee, or where an independent contractor sends a note to the manager complaining about the employee, vicarious liability would not be appropriate, because these other persons are not exercising delegated authority. To be sure, they would not have been able to observe the employee's behavior at the place of business had they not also been empowered to be there by the virtue of their relationship with the employer. But, just as in the sexual harassment context, "something more" than "[p]roximity and regular contact" should be required for imposing vicarious liability for alleged employment discrimination. *Burlington*, 524 U.S. at 760. *See also* SG 16 (employer should not be liable

for false reports of customers, independent contractors or other non-supervisory employees); Pet. 28 n.33 (employer should not be liable for motives of a former employer or "for the biases of a patient").

Similarly, there is no exercise of official delegated authority even by a direct supervisor of the plaintiff where that supervisor's actions are not part of his official delegated duties. "[T]he ultimate focus must be on agency, not supervisory status. The [adjudicator] cannot . . . move straight from a finding of supervisory status to a finding of liability without considering evidence showing that the supervisor did not speak on behalf of management." *NLRB v. Schroeder*, 726 F.2d 967, 969 (3d Cir. 1984). It is not enough that the supervisor complains, or that the supervisor influences; rather, the supervisor must be exercising delegated authority in taking the allegedly discriminatory acts if the employer is to be held vicariously liable for these acts. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring in judgment) ("statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself," do not suffice to show that the employment decision was based on illegitimate criteria).

This approach to vicarious liability is necessary to properly achieve the multi-dimensional goals of federal employment statutes. For example, as this Court has recognized, Title VII does not intend to make employers liable for every frolic and detour of their employees. *See, e.g., Faragher*, 524 U.S. at 798 ("[T]here is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts

amounting to what the older law called frolics or detours from the course of employment."). Rather, federal employment laws intend to make employers liable only for discriminatory actions that an employer has empowered an employee to take and that the employer could reasonably have controlled and, if necessary, prevented. *Id.* at 798-99. Moreover, imposing vicarious liability for acts that do not involve the exercise of official delegated authority, such as where a renegade low-level employee's bias somehow caused a discriminatory action, is not "just." *Id.* at 797 (quoting RESTATEMENT (SECOND) OF AGENCY § 229, cmt. a) ("the 'ultimate question'" in imposing vicarious liability is whether "'it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed'"). Since USERRA's definition of "employer" expressly references key aspects of agency law (*e.g.*, control and delegation), there is no reason that these principles would not apply here.

B. The Plaintiff Must Also Show That The Alleged Unlawful Act Was Both An Actual And A Proximate Cause Of The Adverse Employment Action In Question

In all events, USERRA only prohibits an employer from making an employment decision "on the basis" of an individual's military status. This statutory requirement is best understood as embracing common law causation requirements, as does similar or comparable language in other statutes. *See, e.g.*, *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 63-64 & n.14 (2007) ("based on" credit report incorporates causation principles); *Erickson v. United States*

Postal Serv., 571 F.3d 1364, 1368 (Fed. Cir. 2009) (USERRA's § 4311 incorporates causation requirement); *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005) (same); *see also Gross*, 129 S. Ct. at 2345 ("because of" age incorporates causation principles) (citing cases); *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 141 (2000) (same); *Price Waterhouse*, 490 U.S. at 241-42 (plurality opinion) ("because of such individual's sex" incorporates causation principles).

1. At common-law, it has long been recognized that, even where official acts of agents are involved, liability is appropriate only for acts that cause the injury of the plaintiff. In this regard, causation has both factual and legal components: "[C]ausation is binary, comprising causation in fact and proximate, or legal, causation; it must be shown both that the plaintiff's harm would not have occurred but for the defendants' breach of a legal duty and that the breach proximately caused the harm, that is, that the defendant should bear legal responsibility for the injury." 57A Am. Jur. 2d NEGLIGENCE § 435 (2006). *See also* RESTATEMENT (SECOND) OF TORTS §§ 430-431 (1965) (same).

"[D]eterminations of proximate or legal cause involve not only an inquiry into whether there was an actual 'cause-in-fact' relation" between the act and the injury, but "also considerations of policy." 57A Am. Jur. 2d NEGLIGENCE § 466 (2006). *See also Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. . . . What we do mean by the word

'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."); 57A Am. Jur. 2d NEGLIGENCE § 466 (no proximate cause where "allowing recovery would place too unreasonable a burden on the tortfeasor"); *id.* at § 468 ("practical considerations must at times determine the bounds of correlative rights and duties [and] the point beyond which a court will decline to trace causal connection"). Indeed, it was these "considerations of policy" that led the common law to recognize the concept of a "superseding" cause—"an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his or her antecedent negligence is a substantial factor in bringing about." *Id.* at § 561.

Not surprisingly, in construing various federal statutes, this Court has long embraced both actual and proximate causation principles. The Court has required actual or "but-for" causation to limit liability to only injuries that an actor has factually produced. *See, e.g., Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992) (but-for causation is necessary so that only "factually injured plaintiffs . . . recover"). And the Court has explained that "we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Id.* at 268 (citing WILLIAM L. KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984)) (using the proximate cause concept to limit liability in RICO actions).

2. The Court has applied these concepts of "actual" and "proximate" causations to limit liability under a wide variety of statutory schemes, including RICO, 18 U.S.C. § 1962, the Federal Tort Claims Act, 28 U.S.C. § 1346(b), and the Clayton Antitrust Act, 15 U.S.C. § 15. *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006) (plaintiff cannot maintain its claim on § 1962(c) of RICO in the absence of proximate cause); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703 (2004) (liability under the FTCA requires "proximate causation"—that the act or omission at home headquarters "was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to the headquarters behavior"); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983) (to sue under § 4 of the Clayton Act plaintiff needs to show proximate causation between defendant's violation and the injury). *See also Blue Shield v. McCready*, 457 U.S. 465, 477 n.13 (1982) (quoting Judge Andrews' dissent in *Palsgraf* defining proximate causation); *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (common-law causation principles inform imposition of liability under section 1983). Although not as explicit about the matter, the Court's federal employment law cases also appear to embrace both of these common law causation requirements. *See, e.g., Reeves*, 530 U.S. at 141; *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004); *Price Waterhouse*, 490 U.S. at 241-42 (plurality opinion).

The lower federal courts have expressly embraced these actual and proximate causation requirements in federal employment cases. *See, e.g., Poland v.*

Chertoff, 494 F.3d 1174, 1182 (9th Cir. 2007) (refusing to adopt a simple "but-for" standard of causation for subordinate bias cases because "such a broad conception of liability is inconsistent with tort law principles of causation that apply to civil rights claims") (citing RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965) ("to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent")); *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 615 (7th Cir. 2002) (requiring showing of both but-for and proximate causation for Title VII). As the Fifth Circuit has stated, in a federal employment case, "[t]here must be some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation." *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998).

II. THE CHALLENGED ACT HERE WAS NOT THE PROXIMATE CAUSE OF THE ADVERSE EMPLOYMENT ACTION IN QUESTION

In this particular case, it appears that Mullaly's and Korenchuk's acts may have been acts based on official discretion that they had been empowered by respondent to exercise. It also appears that their acts may have in some way been a part of the chain of events leading to the ultimate decision to terminate petitioner. But, as the court below effectively recognized, it would be wrong to treat those acts as the "proximate" cause of the termination decision.

A. Under The Law, Proximate Cause Is Lacking Where A Non-Biased Decision-Maker, Acting Responsibly, Makes The Actual Employment Decision Based On Her Own Evaluation Of The Matter, Even If A Biased Act Is Part Of The Factual Chain Leading To The Actual Employment Decision

In deciding proximate causation issues, the common law directs courts to ascertain whether "the defendant should bear legal responsibility for the injury" based on considerations of "convenience, . . . public policy, . . . a rough sense of justice," which include a "practical" inquiry into whether "allowing recovery would place too unreasonable a burden on the tortfeasor." 57A Am. Jur. 2d NEGLIGENCE §§ 466, 468; *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting). In the context of employment discrimination laws, that inquiry leads to the following decisional principle: proximate cause is lacking where a non-biased decision-maker made the actual decision and engaged in an independent and responsible evaluation of the matter.

1. As this Court has recognized, employers should not be subjected to liability where their actions are based on reasonable anti-discrimination policies and practices. Declining liability in such circumstances promotes the goals of employment discrimination statutes by providing incentives to employers to create mechanisms to "avoid harm" from discrimination. *Faragher*, 524 U.S. at 805-06. *See Kolstad*, 527 U.S. at 544 (describing Title VII's "prophylactic" goal and declining to adopt a rule that would "would reduce the incentive for employers to implement antidiscrimination programs"). *See also*

Brewer v. Bd. of Trustees of the Univ. of Ill., 479 F.3d 908, 920 (7th Cir. 2007) ("[E]mployers should be liable for their employees' racism only in the general class of cases in which an employer has the practical ability to head off injury to its employee's victim.").

2. This approach also properly guides the Court's resolution of issues of proximate causation. The law should encourage employers to verify information and review recommendations before taking adverse employment actions. When they do so, the law should accept that the employer has replaced any subordinate's bias with the independent and responsible determination of an unbiased decision-maker. Doing so would give effect to this Court's observation that it is imperative to "recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher*, 524 U.S. at 806. *Cf. Poland*, 494 F.3d at 1181-82 (lack of a proximate causation requirement would "weaken the deterrent effect of subordinate bias claims by imposing liability even where an employer has diligently conducted an independent investigation"). In short, recognizing that a decision-maker's independent and responsible evaluation establishes lack of proximate cause promotes the employment discrimination statutes' public policies while giving effect to practical considerations of not imposing "too unreasonable a burden on the tortfeasor." 57A Am. Jur. 2d NEGLIGENCE § 466.

3. Accordingly, the lower federal courts have repeatedly found proximate cause lacking where a non-biased decision maker made the actual decision and engaged in an independent and responsible

evaluation—even in cases where a biased supervisor initiated the inquiry that lead to the ultimate decision. *See, e.g.*, *Richardson v. Sugg*, 448 F.3d 1046, 1052, 1060 (8th Cir. 2006) (decision-maker saw coach's comments to the press and was "stunned" and "shocked"); *Brewer*, 479 F.3d at 914 (decision-maker "inspect[ed] the [illegally-altered parking] tag and verif[ied]" the alteration herself). Further, where a decision-maker gives an employee an opportunity to present his side of the story, courts again hold that proximate cause for liability is lacking. *See, e.g.*, *King v. Rumsfeld*, 328 F.3d 145, 148 (4th Cir. 2003) (decision-maker spoke with employee and his students and observed his classes); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 639 (9th Cir. 2004) (decision-maker spoke with employee and non-biased supervisors, and read letters from youth who played football with employee's permission, which he was not authorized to give); *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 179 (1st Cir. 2008) (decision-maker made his own independent decision based on the facts of the situation and gave employee an opportunity to explain his absences, which he failed to do adequately); *Wilson v. Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992) (decision-maker spoke with non-biased manager who interviewed employee and his colleagues, who confirmed that employee lied about unauthorized schedule changes); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997) (decision-maker examined overdue invoices and spoke with employee about her numerous reprimands; the office also had a policy of automatic termination after three reprimands).

B. As The Court Below Found, The Record Here Shows That Buck, A Non-Biased Decision-Maker, Acting Responsibly, Made The Actual Employment Decision Based On Her Own Evaluation Of The Matter

The record here establishes lack of proximate cause under these standards. There is no dispute that Buck, the ultimate decision-maker, was non-biased; and, as the record shows, she acted independently and responsibly in determining that Staub had to be terminated.

First, even before receiving the recommendation to fire Staub, Buck had received numerous negative reports about Staub from non-biased supervisors, managers and Staub's colleagues, and was involved in several meetings arising out of those reports in the course of the preceding two years, including the same month (April 2004) as the firing. The complaining personnel, who Staub does not allege to have anti-military bias, included: Employment Specialist Mandy Carbiledo, whose recent tech hire resigned because she could not work with Staub (R.5:90; Pet. App. 10a); Nurse Recruiter Sheila Johnson, whose registered nurse had quit and who had trouble recruiting because Staub was difficult to work with (R.5:90-91; Pet. App. 10a); Doneda Halsey, who complained about Staub's flirtations with radiology students (R.5:92; Pet. App. 10a); Brenda Carothers, the Director of Human Resources, who brought to Buck's attention a meeting conducted to remind Staub and others that they had to help in non-invasive Diagnostic Imaging (R5:94-95); and angio tech Angela Day, who complained, during a meeting with Buck and Vice President McGowan, that Staub

was disrespectful and frustrating to work with (R.5:101). Indeed, McGowan reaffirmed that he had heard negative reports about Staub's conduct from various sources. (*Id.*).

Second, Buck evaluated Staub's side of the story. On April 20th, 2004, in Buck's office and with Buck present, Staub provided his explanation of his whereabouts after Korenchuk (Staub's supervisor) offered his version of the events; Staub then refused to sign the termination notice. (R.5:384-85). On April 25, 2004, Staub filed a five-page written grievance, with his detailed explanation of the January 27, 2004 incident, and of his prior encounters with the Human Resources department arising out of various complaints about his attitude and performance. (P. Ex. 28). The grievance included allegations of anti-military bias by Staub's immediate supervisors, Mullaly and Korenchuk. *Id.* On May 3, 2004, Buck issued a written response. (D. Ex. 59).

Third, Buck effectively evaluated the January 27 incident twice; once as part of the review of Staub's April 20, 2004 grievance after he was terminated, and once even before it became a write-up in January, 2004. Buck received her information from Carothers, who, upon reviewing background facts, recommended the issuance of a write-up for both Staub and Sweborg (Buck's colleague who was also not available to help in the x-ray department that day). (R.5:88, 95-97).

Fourth, Buck reviewed Staub's personnel file, which contained his evaluations and the record of his 1998 firing. Staub was allowed to return on the condition that he was to "communicate to [his] supervisor whenever [he is] leaving the work area."

(R.5:150). It was also made emphatically clear that any insubordination would be grounds for "immediate dismissal." *Id.* ("Any trends toward the above contingencies or any insubordination, immature behavior, unprofessionalism, or lack of support for management decision will be grounds for immediate dismissal."). *See also* Pet. App. 3a n.1. Yet Staub's 2002 and 2003 employment evaluations state that "Vince continues to disappear during scheduled hours and does not voluntarily help during idle time," (R.3:162, D. Ex. 18), and that "Vince [needs] to be aggressive in his attempt to work throughout the Dept. . . . Angio at Proctor is also a part of diagnostics and work needs to be done in both areas." (R.5:135, 141, P. Ex. 32).

Given Buck's independent and responsible evaluation of the information regarding Staub, there is no proximate causation. This is an easier case than *Richardson*, 448 F.3d 1046, or *Brewer*, 479 F.3d 908, where the decision-makers merely independently inspected evidence (press conference remarks and parking tag, respectively), but did not speak to the employee in issue. Buck examined Staub's file and then also got Staub's full account about the incident. Furthermore, as in cases where courts have held that there is no proximate causation, Buck received numerous negative reports about Staub from various non-biased sources, such as Carbiledo, Johnson, Halsey, Carothers, Day, and McGowan, who were his supervisors and colleagues and had first-hand encounters with him, and all of whom complained about Staub's bad attitude, insubordination and unprofessional conduct. *See, e.g.*, *King*, 328 F.3d at 148, *Vasquez*, 349 F.3d at 639, *Thompson*, 522 F.3d at 179, *Wilson*, 952 F.2d at 944-

46. Finally, similar to *Willis*, 118 F.3d at 546-47, where the office had a policy of automatic termination after three reprimands and Willis had at least three that year, here, the very condition of Staub's return after his 1998 firing was that any act of insubordination would be the basis for "immediate dismissal," and as Buck's review of Staub's file demonstrated, Staub engaged in plenty of such acts. The review system that this Court so highly prizes in employment discrimination actions worked exceedingly well here.

The Seventh Circuit therefore reached the correct conclusion here in holding that respondent is not liable for the alleged biased acts of Mulally and Korenchuk. Here, although the Seventh Circuit did not engage in an explicit proximate causation analysis, it recognized that Buck was not biased and acted in a responsible manner in evaluating Staub's personnel problems and in terminating him. The court noted that Buck was aware of Staub's "attitude problems," including "offend[ing] numerous others for reasons unrelated to his participation in the Reserves." Pet. App. 20a. The court further noted that Staub's actions thus deprived him of "the safety net of a good reputation" by the January 27 write-up. *Id.* The court also acknowledged that "Buck looked beyond what Mulally and Korenchuk said" and "determined that Staub was a liability to the company" because he "was not a team player," as also evidenced by past "frequent complaints" about Staub. *Id.* at 20a, 10a. As these facts and additional facts in the Record demonstrate, proximate causation between the acts of Mullaly and Korenchuk on the one hand, and the termination decision made by Buck on the other hand, was lacking.

III. THE CONTRARY ARGUMENTS OF THE GOVERNMENT AND PETITIONER CONCERNING THE PROXIMATE CAUSATION ISSUE ARE UNFOUNDED

The Government appears to embrace the agency and causation principles framework. SG 22 (citing lower court cases finding no liability because the decision-maker reached an independent decision). The Government also appears to accept that an investigation entailing the questioning of non-biased sources would mean that proximate cause is lacking and, thus, there is no liability, unless a decision-maker did "nothing more than ask [a biased] supervisor for a fuller account." SG 23. *Cf.* SG 26 ("Buck did not conduct a meaningful independent investigation," because the investigation was "minimal" and could have been "more robust"). Petitioner nominally accepts these principles as well. Pet. 49, 56. But the Government's treatment of causation and Petitioner's similar approach are ultimately unfounded.

First, both the Government and Petitioner confuse actual and proximate causation. The Government suggests that an independent investigation would preclude liability because "the adverse action would have been taken anyway." SG 24 ("The question is not whether the ultimate decisionmaker was negligent in failing to conduct an investigation or in structuring the investigation in a particular way. . . . An investigation is relevant only to the extent that it sheds light on whether the supervisor's discriminatory misuse of delegated authority was a substantial factor in bringing about an adverse employment action, or on whether the adverse action

would have been taken anyway."). Petitioner similarly argues that an investigation might show that the biased acts did not actually cause the adverse employment action. Pet. 56 (if in response to a biased supervisor's recommendation, the decisionmaker "disregard[ed] th[e] second hand account and personally interviewed the witness, the trier of fact could conclude that the falsified account had no impact on the ultimate decision"). But these arguments about whether an action would have happened anyway simply raise an actual causation question. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 240 (plurality opinion) ("In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way."). There is still the distinct question under the common law of whether the underlying biased acts are the proximate cause of the adverse employment action in circumstances where the ultimate adverse employment decision is made by a non-biased person on the basis of a responsible and independent inquiry. As to that issue, the Government and petitioner are wrongly silent.

Second, the Government ignores and misconstrues crucial facts demonstrating that Buck acted in a responsible manner before firing Staub. Indeed, the Government's treatment of the evidence is outright misleading.

The Government asserts that Buck "did nothing more than consult with Korenchuk, review petitioner's personnel file, and rely on her recollection

of . . . past issues." SG 26-27. As explained in Part II(C), however, "past recollection" is an inadequate description of what happened: The facts show that Buck was made continuously aware (for the two years preceding the firing) by numerous managers and Staub's colleagues, who had first-hand encounters with Staub, about Staub's discipline problems. (R.5:90-103). "Review [of Staub's] personnel file" is also an inadequate description of Buck's examination of the file which contained Staub's 1998 firing and the conditions for his return, such as that he "communicate to [his] supervisor whenever [he] leav[es] the work area," and a warning that any insubordination would be grounds for "immediate dismissal." (R.5:431). The file also contained evaluations which evidenced such insubordination and unprofessionalism. (R3:162; R.5:135, 141). The file confirmed reports of Staub's inappropriate attitude that Buck was continuously receiving from various non-biased sources.

The Government is similarly wrong in claiming that Buck consulted only with Korenchuk. In fact, she consulted with Carothers, Director of Human Services, regarding the January 27 incident. (R.5:96, 185). There is no allegation that Carothers had an anti-military bias.

Finally, the Government is wrong to assert that Buck "failed to take even a simple step of asking petitioner for his side of the story." SG 27. The Government cites the decision below, which noted that "Buck failed to pursue [petitioner's] theory that Mulally fabricated the [January 2004] write-up; [and that] had Buck done this, she may have discovered that Mullaly indeed bore a great deal of anti-military

animus." Pet. App. 20a. However, this statement merely indicates that Buck did not pursue a particular theory, not that Buck did not talk to Staub at all. As explained in Part II(C), on April 20, 2004, Staub gave his oral explanation to Buck. (R.5:361-62). On April 25, Staub submitted a five-page written grievance, explaining the January 27 write-up, prior incidents leading to complaints from various managers to the Human Resources, and including his allegations of Mullaly's and Korenchuk's anti-military bias. (P. Ex. 28). Buck clearly evaluated Staub's explanation and responded in writing. (D. Ex. 59). In short, the only one that is not considering the other person's "side of the story" is the Government.

In sum, as shown in Part II(C), Buck acted in a responsible manner, consistent with the goals of the employment discrimination statutes. There simply is no proximate causation between the challenged acts and the adverse employment action of which Staub complains.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-400

IN THE

Supreme Court of the United States

VINCENT E. STAUB,
Petitioner,

v.

PROCTOR HOSPITAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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September 2010

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICUS CURIAE* BY EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this Motion for Leave to File Brief Out of Time as *Amicus Curiae* by Equal Employment Advisory Council in Support of Respondent.[1] The

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

brief supports the position of Respondent before this Court in favor of affirmance.

In support of its motion for leave to file, Equal Employment Advisory Council submits the following:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes more than 300 of the nation's largest private sector companies, collectively providing employment to close to 20 million people throughout the United States.

2. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

3. All of EEAC's members are employers subject to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, as well as other local, state and federal nondiscrimination laws. Most of EEAC's members are federal contractors, and of these, many are defense contractors. EEAC members regularly go beyond the letter of the law to support their employees who are serving our country.

4. As potential defendants to claims of discrimination under USERRA, and other laws prohibiting discrimination in employment, EEAC's members have a direct and ongoing interest in the issue presented

before this Court concerning the circumstances under which an employer may be held liable for intentional discrimination based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision.

5. EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention matters that the parties have not raised. Because of its significant experience in these matters, EEAC is well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

6. EEAC's brief originally was submitted for filing on September 8, 2010 in reliance upon the Court's Order extending the time for filing of Respondent's brief to and including September 1, 2010. EEAC only just learned that Respondent filed on August 31, 2010, rendering its September 8, 2010 submission untimely by one day. Petitioner will not be prejudiced by this Court granting our Motion for Leave.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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September 2010

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IN THE

Supreme Court of the United States

No. 09-400

VINCENT E. STAUB,
Petitioner,

v.

PROCTOR HOSPITAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. This brief supports the position of Respondent before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes more than 300 of the nation's largest private sector companies, collectively providing employment to close to 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, as well as other local, state and federal nondiscrimination laws. Most of EEAC's members are federal contractors, and of these, many are defense contractors. EEAC members regularly go beyond the letter of the law to support their employees who are serving our country.

As potential defendants to claims of discrimination under USERRA, and other laws prohibiting discrimination in employment, EEAC's members have a direct and ongoing interest in the issue presented before this Court concerning the circumstances under which an employer may be held liable for intentional discrimination based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision. This issue has been

the subject of much court litigation under a variety of statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* Although courts generally recognize that employers may be vicariously liable for the actions of a biased non-decisionmaker, they disagree on the extent to which, and under what circumstances, liability might attach. The standard adopted by the Seventh Circuit below, which would impute liability to the employer only where the biased non-decisionmaker is able to "singularly influence" the employment decision, represents a fair and workable solution to the challenges presented in these unique cases.

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention matters that the parties have not raised. Because of its significant experience in these matters, EEAC is well-situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

The Respondent, Proctor Hospital of Illinois, hired the Petitioner, Vincent Staub, in 1990. Pet. App. 1a. Petitioner, an angiography technologist (angio tech), worked in the hospital's Diagnostic Imaging Department. *Id.* At the time of hire and throughout his employment, Petitioner served as a member of the United States Army Reserve with drill and training obligations one weekend each month and for a two- to three-week period in the summer. *Id.* at 3a.

Petitioner's supervisor, Michael Korenchuk, headed-up the Diagnostic Imaging Department, which is divided into two units: angiography and a larger general diagnostics unit. *Id.* at 4a, 49a 50a. Although the Respondent assigned Petitioner to angiography, angio techs were trained to work in both units and helped out wherever a need arose. *Id.* at 6a.

Petitioner had a checkered employment history with the Respondent. Although "technically competent," Petitioner exhibited problems relating to his "availability, attitude, and communication." *Id.* In 1998, well before the events that gave rise to this action took place, the Respondent fired Petitioner for refusing to work past a scheduled shift. *Id.* at 3a n.1. The hospital reinstated him after he grieved the decision, but only on the condition that he communicate with a supervisor before leaving his work area. *Id.* The hospital also warned Petitioner at that time that any "insubordination, immature behavior, unprofessionalism or lack of support of [a] management decision[] would be grounds for immediate dismissal." *Id.* In addition, Petitioner's annual performance reviews referenced these and other problems, including his failure to work well with others. *Id.* at 5a-6a n.2.

The situation worsened in 2000 when Janice Mulally, a staff technologist, assumed responsibility for preparing the department's work schedules. *Id.* at 3a. Although Petitioner had been enjoying weekends off, Mulally began assigning him weekend shifts that conflicted with his Reserve drill schedule. *Id.* at 4a. Mulally described Petitioner's military duties as "bullshit," sometimes made him use vacation days to drill, and occasionally made him work extra shifts without advance notice – telling him this was

one way he could "pay back" the department for "bend[ing] over backwards" to accommodate his Reserve activities. *Id.* Petitioner complained to Korenchuk who, in turn, spoke to Mulally. Although Mulally responded by accommodating Petitioner, the scheduling problems persisted. According to Petitioner, Korenchuk also derided the Reserves on two occasions. *Id.*

In January 2004, Petitioner received orders to report for 'soldier readiness processing' – the first step to active deployment. *Id.* at 6a. Mulally and Korenchuk, became apprehensive and questioned Petitioner repeatedly about his deployment schedule. *Id.* Not long after, Mulally gave Petitioner a written warning, approved by Korenchuk, citing Petitioner's failure to provide assistance in the general diagnostics unit on the morning of January 27. *Id.* The incident that gave rise to the warning involved another angio tech, Angie Sweborg. *Id.* According to Mulally, neither showed up to lend a hand in the general diagnostics area when asked to do so, although Sweborg and Petitioner disputed this. *Id.* at 7a. Regardless of what actually transpired, both received a write-up instructing them to: 1) report to Korenchuk or Mulally any time there were no patients or related work in angiography, and 2) remain in the general diagnostics area, unless and until they reported to Korenchuck or Mulally why they needed to go elsewhere. *Id.*

In April of 2004, Angie Day, another coworker of Petitioner, met with Korenchuk, Linda Buck (Vice President of Human Resources), and Korenchuck's supervisor, R. Garrett McGowan (Chief Operating Officer), to complain that Korenchuk ignored complaints that Petitioner was "abrupt," difficult to work

with, and frequently "absented himself" from the department. *Id.* at 8a. She later resigned her position at the hospital, citing Petitioner's behavior as the reason for her departure. *Id.* at 51a.

McGowan, who had heard similar complaints about Petitioner from other staff, directed Korenchuk to develop a performance improvement plan for Petitioner. *Id.* at 9a. Before a plan could be implemented, however, Petitioner violated the terms of his January 27 written warning by leaving the general diagnostics area with Sweborg without first having obtained permission from Korenchuck or Mulally. *Id.* Instead, Petitioner left Korenchuck a voicemail stating that he and Sweborg had gone to lunch. *Id.*

Korenchuck reported the incident to Buck, but did not apprise her of the voicemail. *Id.* Buck made the decision to terminate Petitioner, stating in the termination slip that the reason was Petitioner's failure to comply with the terms of the January 27 write-up. *Id.* at 10a. Buck based her decision on other factors as well, including a review of Petitioner's personnel file and the concerns raised by Day. *Id.* She also considered the "frequent complaints" she received about Petitioner when she first joined the hospital in 2001, as well as the fact that two other female employees, in addition to Day, had resigned from the hospital because of problems with Petitioner. *Id.* One of the women said Petitioner made her feel like "gum on the bottom of his shoe," and the other offered similar reasons. *Id.* Finally, Buck took into account a conversation she had with a hospital recruiter who had complained to her about how difficult it was to attract quality candidates because of Petitioner's reputation. *Id.*

At the time Buck made the decision to terminate Petitioner, she had no knowledge of Mulally's alleged anti-military bias and harbored no such bias herself. *Id.* at 11a. Nor was she aware of Mulally's purported desire to see Petitioner fired. *Id.*

Petitioner grieved Buck's termination decision and, in doing so, claimed for the first time in his grievance that Mulally had fabricated the reasons behind the January 27 write-up because of his military status. *Id.* Buck reviewed and ultimately denied the grievance, and let the decision stand on the basis that, despite Petitioner's technical competencies, he lacked the ability to work well with others. *Id.*

Petitioner filed an action in U.S. District Court alleging violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, and argued that, although Buck harbored no anti-military bias, the Respondent should nonetheless be held liable because she had relied on false information from Mulally without vetting the information "in any meaningful way." *Id.* at 12a. A jury returned a verdict for Petitioner, and the district court denied the Respondent's motion for a new trial or judgment as a matter of law. *Id.* The Respondent appealed. *Id.*

The Court of Appeals for the Seventh Circuit reversed the district court ruling and remanded the case with instructions to enter judgment in favor of the Respondent. *Id.* at 21a. In so ruling, the court concluded that Petitioner failed to show that Mulally exerted "singular influence" over Buck, such that she acted as a conduit for unlawful discrimination. *Id.* Petitioner petitioned this Court for a writ of *certiorari*, which was granted on April 19, 2010.

SUMMARY OF ARGUMENT

The Seventh Circuit's "singular influence" standard, which holds an employer vicariously liable under a subordinate bias theory only when the employee who lacks formal authority to take an employment action nonetheless exercises "singular influence" over the person who has such authority, is consistent with this Court's earlier rulings applying agency law principles to federal employment discrimination actions, which declined to hold employers vicariously liable for discrimination in all circumstances. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70 (1986); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998).

The Seventh Circuit standard also is consistent with the Court's ruling in *Reeves v. Sanderson Plumbing*, which held that an employer may be liable for unlawful discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, if the plaintiff can show that an employee who lacks formal decisionmaking authority nevertheless is "principally responsible" for the adverse employment decision. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151-52 (2000). In keeping with these rulings, the Seventh Circuit's "singular influence" standard appropriately looks to the actions of the "actual decisionmaker" or the person "principally responsible" for the decision in determining whether to assign liability.

Where, as here, the formal decisionmaker does not blindly rely on the recommendations of a biased subordinate or otherwise defer to his will, but instead exercises independent judgment in making an employment decision, the employer should not

be liable. The formal decisionmaker in this case harbored no anti-military bias and possessed sufficient information to independently assess Petitioner's performance and conduct. Because she was not under the singular influence of someone else, and because she had an honest belief that Petitioner had engaged in misconduct, her decision should be respected without any interference or judicial second-guessing. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005); *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410-11 (7th Cir. 1997).

Although the Seventh Circuit correctly held that a formal decisionmaker's independent investigation ordinarily will serve to break the causal chain between the decision of a biased subordinate and the adverse employment action, the Court should not impose any standard that would effectively *require* employers to formally investigate every employment decision as if it were an actual complaint of discrimination. Such a mandate would be unworkable for employers, which make countless employment decisions every day and require the ability to respond quickly to staffing needs. Nor would such a standard encourage compliance or motivate companies to expand prevention efforts because it would be prohibitively expensive, logistically impossible, and unlikely to lead the discovery of discrimination much beyond what is already reported by employees themselves.

Furthermore, requiring employers to question the motives of every person who reports wrongdoing would undermine an employer's efforts to address workplace misconduct by diverting attention away

from the problem at hand. Accordingly, a more appropriate standard should focus on the independence of the actual decisionmaker, affording that person the flexibility to evaluate situations based on experience and judgment.

ARGUMENT

I. THE COURT BELOW CORRECTLY RULED THAT PETITIONER FAILED TO STATE A CLAIM OF INTENTIONAL DISCRIMINATION UNDER THE SO-CALLED "CAT'S PAW" OR "SUBORDINATE BIAS" THEORY

A. In Order To Prevail Under A "Cat's Paw" Or Subordinate Bias Theory, A Plaintiff Must Show That The Biased Subordinate Possessed "Singular Influence" Over The Formal Decisionmaker, Such That He May Be Viewed As The Person Principally Responsible For The Decision Or, For All Intents and Purposes, The Actual Decisionmaker

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, in part to prohibit discrimination in employment on the basis of military service. 38 U.S.C. § 4301(a)(3). Section 4311 of the statute provides that "a person who is a member of . . . a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership . . . [or] performance of service . . . ." 38 U.S.C. § 4311(a). Requiring clear

proof of discriminatory motive, USERRA places the burden of proof on the service member to show that his or her military status or duties served as at least one motivating factor behind the adverse personnel decision. 20 C.F.R. § 1002.22.

In their enforcement of USERRA, courts apply the procedural framework and evidentiary burdens applicable to cases brought under the National Labor Relations Act (NLRA), as approved by this Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *See, e.g., Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001); *Gummo v. Village of Depew*, 75 F.3d 98, 106 (2d Cir. 1996); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898-99 (9th Cir. 2002). Under this scheme, the employee first must show, by a preponderance of the evidence, that his or her protected status was "a *substantial or motivating* factor" for the adverse action. *Transp. Mgmt.*, 462 U.S. at 400-01 (footnote omitted) (emphasis added). A "substantial or motivating factor" is one that "a truthful employer would list if asked for the reasons for its decision." *Kelley v. Maine Eye Care Assocs., P.A.*, 37 F. Supp.2d 47, 54 (D. Me. 1999). Likewise, a person's military status or duties may be a "substantial or motivating factor" if the employer "'relied on, took into account, considered, or conditioned its decision on that consideration.'" *Brandsasse v. City of Suffolk*, 72 F. Supp.2d 608, 617 (E.D. Va. 1999) (quoting *Chance v. Dallas County Hosp. Dist.*, 1998 WL 177963, at *3, 1998 U.S. Dist. LEXIS 5110, at *3 (N.D. Tex. 1998)). Once this requirement is met, the burden of proof shifts to the employer to show, as an affirmative defense, that it would have taken the same action anyway for a non-discriminatory reason. *Transp. Mgmt.*, 462 U.S. at 400-01.

The framework applied in USERRA cases differs from the traditional paradigm established by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), and which applies to discrimination cases brought under other federal antidiscrimination laws. *Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11 (1st Cir. 2007). Under burden-of-proof allocations approved by *Transportation Management*, a USERRA plaintiff must do more than satisfy the basic elements of a *prima facie* case, but rather must demonstrate his or her military status or duties actually motivated the employer's decision. *NLRB v. Weiss Mem'l Hosp.*, 172 F.3d 432, 442 (7th Cir. 1999); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 899 n.1 (9th Cir. 2002). Until then, the employer is under no obligation to prove the affirmative defense. *Weiss Mem'l Hosp.*, 172 F.3d at 446; *Leisek*, 278 F.3d at 899 n.1.

By all accounts, the decisionmaker in this case, Linda Buck, never "relied on, took into account, considered, or conditioned [her] decision" to terminate Petitioner on his military status or obligations. *Brandsasse*, 72 F. Supp.2d at 617 (citation omitted). Because Petitioner could not show Buck was in any way motivated by Petitioner's protected military status or obligations, he instead pursued his case under the so-called "cat's paw" or "subordinate bias" theory of liability, which courts have applied in various forms under other federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* Under this theory, an employer may be vicariously liable for discrimination in situations where a biased employee's actions influence or

otherwise lead to an adverse action against another employee, even though the employer is unaware of the bias when it made the employment decision and did not itself consider the employee's protected status in making the decision.

Although courts generally have recognized that employers may be vicariously liable for the actions of a biased non-decisionmaker, their rulings differ on the extent to which, and under what circumstances, liability should be imposed. Under the Seventh Circuit's "singular influence" standard, "'where an employee without formal authority to alter the terms and conditions of a plaintiff's employment nonetheless uses her 'singular influence' over an employee who does have such power to harm the plaintiff for [legally protected] reasons, the actions of the employee without formal authority are imputed to the employer and the employer is in violation [of the law].'" Pet. App. 14a (quoting *Brewer v. Board of Trustees*, 479 F.3d 908, 917 (7th Cir. 2007)). The Fourth Circuit applied a similar standard in *Hill v. Lockheed Martin Logistics Management, Inc.*, which held that the plaintiff must show "the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer." 354 F.3d 277, 291 (4th Cir. 2004).

The approach taken in both of these rulings is consistent with this Court's earlier pronouncements on the subject of vicarious liability, which declined to hold employers automatically liable for discrimination under all circumstances. In *Meritor Savings Bank, FSB v. Vinson*, for example, the plaintiff argued for strict liability, contending that Title VII's definition of "employer" as including an "agent"

requires employer liability whenever a supervisory employee is involved. 477 U.S. 57, 70 (1986). The employer argued on the other hand that it could not be held liable for a supervisor's misconduct unless it had notice and failed to take action. *Id.* Although this Court did not issue a definitive rule at the time, it did reject an automatic liability standard, having concluded:

> [W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common law principles may not be transferable in all their particulars . . . , Congress' decision to define "employer" to include any "agent of an employer, 42 U.S.C. § 2000e(b), *surely evinces an intent to place some limits on the acts of employees for which employers . . . are to be held responsible.*

Id. at 73 (emphasis added). Indeed, the Court expressly rejected any rule that would "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Id. See also Faragher*, 524 U.S. at 804 n.4 (noting that the decision of Congress to "leave *Meritor* intact" when passing the 1991 Amendments suggests it "relied on [the Court's] statements . . . about the limits of employer liability").

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754 (1998), the Court further defined the limits of employer liability for the acts of employees. Once again, the Court declined to automatically impute liability to the employer for the actions of a supervisor, except where the supervisor actually "*makes* a tangible [and adverse] employment decision," such as hiring, firing, failing to promote,

Ellerth, 524 U.S. at 761 (emphasis added). *See also Faragher*, 524 U.S. at 804 (the imposition of liability based on the misuse of supervisory authority must be squared with *Meritor's* holding that an employer is not 'automatically' liable).

Although *Faragher* and *Ellerth* did not address whether an employer may be liable when a biased supervisor who *lacks* authority "to make the tangible employment decision" nonetheless causes or influences the decision, the Court did cite with apparent approval *Shager v. Upjohn Co.*, in which the Seventh Circuit found that an employer could be held liable for the firing of an age-protected employee where an admittedly unbiased personnel committee simply "rubber stamped" the recommendation of a biased supervisor and thereby served "as a conduit of [the supervisor's] prejudice." 913 F.2d 398, 405 (7th Cir. 1990). Significantly, although the Seventh Circuit had ruled that "the establishment of corporate committees authorized to rubber stamp personnel actions" would not prevent employer liability, it also recognized that if the committee "was not a mere rubber stamp, but made an independent decision . . . there would be no ground for finding even an innocent violation of the Act." *Id.* at 406.

This Court similarly ruled in *Reeves v. Sanderson Plumbing* that an employer may be liable for unlawful discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, where a plaintiff can show that an employee who lacks formal decisionmaking authority nevertheless is "principally responsible" for the adverse employment decision. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151-52 (2000) (emphasis added). In *Reeves*, the bias of a supervisor who was

married to the "formal decisionmaker" was imputed to the company because he wielded "absolute power" within the organization. *Id.* at 152. Although his wife may have had formal responsibility for making the decision, the Court determined that the husband was the "actual decisionmaker" behind the action. *Id.*

The standard advanced by the Seventh Circuit below, as well as the Fourth Circuit, both of which look to the actions of the "actual decisionmaker" or the person "principally responsible" for the decision in assigning liability, is consistent with application of agency law principles and this Court's holding in *Reeves*. Under the Seventh Circuit's standard, courts appropriately should focus on whether the formal or actual decisionmaker has made his or her own independent decision. Where a biased subordinate exerts *singular influence* over the decisionmaker, such as when the subordinate wields "absolute power" or is able to recommend actions that are simply "rubber stamped," it cannot be said that the formal decisionmaker made an independent decision to take the personnel action in question. Vicarious liability would be appropriate in such cases because employers should not be permitted to "insulate themselves from liability simply by hiding behind the blind approvals, albeit non-biased, of formal decisionmakers." *Hill*, 354 F.3d at 290. *See also Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) ("courts will not blindly accept the 'titular' decisionmaker as the true decisionmaker"); *Willis v. Marion County Auditor's Ofc.*, 118 F.3d 542, 547 (7th Cir. 1997) (the "cat's paw" line of cases designed to prevent an employer from escaping liability "by setting up many layers of *pro forma* review, thus making the operative decision that of a

subordinate with an illicit motive") (citation omitted) (emphasis added).

However, where a formal decisionmaker does *not* blindly rely on the recommendations of a biased subordinate or otherwise bend to his will, and instead exercises independent (and unbiased) judgment in making the decision, liability should not attach and the employer's decision should be respected. This is true even if someone with improper motives may have played some role in the decision, without having singularly influenced it. This is true, even if the employer later discovers (with the benefit of hindsight and aided by the court's discovery process) that the decision may not have been the best one or even correct.

As this Court previously has observed, the anti-discrimination laws are "not intended to 'diminish traditional management prerogatives.'" *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (citation omitted). In keeping with this ruling, courts consistently have recognized that an employer's legitimate, nondiscriminatory reason for taking an adverse employment action, even if based on an honest mistake, is still *not a discriminatory reason*, and therefore, should be respected. *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005) ("the proper inquiry *is not* whether [the company] was factually correct . . . [but] whether [the employer] honestly believed" the employee engaged in misconduct); *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 411 (7th Cir. 1997) ("it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination").

B. The Decisionmaker In This Case Made An Independent Decision To Terminate Petitioner And Was Not Under The "Singular Influence" Of Anyone Else

Here, Linda Buck did not act as a "rubber stamp" for Mulally, Korenchuk, or anyone else. Nor does the evidence suggest that Mulally or Korenchuk wielded "absolute power" over the hospital, the department, or even Buck as the sole decisionmaker. Rather, Petitioner had a long history of conduct and performance-related problems while working for the Respondent, problems that pre-dated Mulally and Korenchuck and which collectively served as the basis for Buck's decision.

Those problems manifested a consistent pattern throughout Petitioner's employment. They included perceived "attitude problems" and an inability to work collaboratively with many of his co-workers. Pet. App. 4a-10a. They involved unscheduled and unapproved "disappearances" from his work area, coupled with poor communication with superiors. *Id.* The Respondent found Petitioner's behavior so concerning that it terminated him once before, however briefly, in 1998. *Id.* at 3a. Although the hospital ultimately gave Petitioner a second chance, the fact that the Respondent conditioned his return on terms virtually identical to those imposed in the contested January 27 write-up is telling. *Id.*

Buck, a seasoned professional schooled in the requirements of the federal anti-discrimination laws and sound human resource practices, had all this in mind when she made the decision to terminate Petitioner. She did not form her opinion of Petitioner based solely on information from Mulally or

Korenchuk, but rather from many different sources including her own independent observations and interactions with hospital staff. She personally fielded "frequent complaints" about Petitioner when she first joined the hospital in 2001. *Id.* at 10a. She knew of three employees, including one with whom she met face-to-face, who had resigned because of Petitioner. *Id.* She spoke with a hospital recruiter who complained of difficulties in attracting qualified candidates to the department because of Petitioner's reputation. *Id.* Many of these problems were documented in performance evaluations and other papers contained in Petitioner's personnel file, which Buck reviewed before making her decision. *Id.* at 5a-6a n.2.

In short, Buck had sufficient information to assess Petitioner's performance, independent of Mulally and Korenchuk, and to make her own decision about whether to retain him. Although the incident that prompted Buck to reevaluate Petitioner's employment may have come to her by way of Korenchuk, the fact remains that she had more in mind than just this one incident when she made the decision to terminate. *Johnson v. Kroger Co.*, 319 F.3d 858, 877 (6th Cir. 2003) (where, as here, the decision-maker "base[s] her decision upon an independent assessment of [the employee's] job performance, informed principally by her own direct, repeated and unchallenged observations," the employer should not be liable, since the biased subordinate "merely corroborated [her] own assessment of [the] employee's shortcomings"); *Maarouf v. Walker Mfg. Co.*, 210 F.3d 750 (7th Cir. 2000) (perception of plaintiff's inadequate work performance based not solely on views of supervisor who harbored religious bias, but

also independently noted by other supervisors as well).

Petitioner speculates that Buck "surely would not have disciplined [him] at all," if only Korenchuk had disclosed the fact that he had left a voicemail explaining his whereabouts. Brief for Petitioner at 40. Although Buck might not have found this information relevant to her decision (there is a fundamental difference between telling a supervisor where you are and asking permission to go there), Petitioner's singular focus on only the last in the series of transgressions misses the broader point, *e.g.*, that Petitioner simply did not "have the safety net of a good reputation" needed to save his job. Pet. App. 20a. As the Seventh Circuit aptly explained, even if Petitioner had behaved reasonably that day, "his track record nonetheless supported Buck's action." *Id.*

Just as important is the fact that Buck made her decision free of any discriminatory motive. As Petitioner himself concedes, Buck harbored no anti-military biases and did not take his military status or obligation into account in any way when making her decision. Buck's decision centered entirely on legitimate, non-discriminatory business concerns and her honest belief that Petitioner had engaged in misconduct. That decision should be respected without any interference and judicial second-guessing. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005); *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410-11 (7th Cir. 1997).

II. EMPLOYER LIABILITY UNDER A SUBORDINATE BIAS THEORY SHOULD NOT HINGE ON WHETHER THE EMPLOYER CONDUCTS AN INVESTIGATION BEFORE TAKING A PERSONNEL ACTION

Although the Seventh Circuit's ruling below correctly held that a formal decisionmaker's independent investigation ordinarily will serve to break the causal chain between the decision of a biased subordinate and the adverse employment action, EEAC respectfully urges this Court not to adopt any rule that would effectively *require* employers to investigate every time an employment action is contemplated and in the absence of a specific complaint of discrimination. Such a mandate would be wholly unworkable for employers, particularly larger ones, which necessarily make countless employment decisions every day, including those relating to hiring, promotions, raises, suspensions, and as in this case, terminations.

A more appropriate standard should focus on the decisionmaking process and whether the formal decisionmaker made an independent decision, without the "singular influence" of anyone else. Furthermore, it is important that courts afford decisionmakers some flexibility in how they evaluate a situation, based on their own professional experience and judgment, as the Seventh Circuit did here. Thus, a decisionmaker might choose to review the employee's personnel file before making a decision, or not, depending on the circumstances. Likewise, a decisionmaker might speak directly with the affected employee in some cases, while this step might not be necessary or even prudent in others.

The practical consequences of a standard that would effectively require an employer to postpone all personnel decisions until after a formal investigation has affirmatively ruled-out any remote possibility of subordinate bias would be profound. Companies must have the ability to respond expeditiously to staffing needs and thereby ensure business operations are able to continue safely and efficiently. Large companies make hundreds, if not thousands, of employment decisions every week. A company would be unable to function effectively if required to second-guess each and every personnel decision on the off-chance that someone with discriminatory motives might have played some role (however small and inconsequential) in events leading up to it.

Nor could employers shoulder the tremendous costs associated with such investigations. In order to rule-out any possibility of subordinate bias, companies would need to actively investigate not just the employment decision at-hand, but also any previous employment actions that may have informed it. Depending on the circumstances, a single investigation could involve extensive interviews with employees and managers and the review of voluminous documents and data. The employer would have to scrutinize the motives of every person involved in the decision. All this to uncover discriminatory bias that *has never been alleged* and likely will not exist in the vast run of cases.

In the context of this case, which involves a relatively straightforward discharge decision, an "independent investigation rule" might seem deceptively simple. Indeed, it would not be simple at all. This case alone would have required multiple investigations, including extensive witness interviews, into

disciplinary actions that occurred not only at the time of Petitioner's discharge, but *years earlier*. If employers must go to these lengths before *every* discharge, the burden would be crushing.

The same holds true for other types of employment decisions. Consider, for example, a promotion decision involving a single position and fifteen candidates. An independent investigation rule would effectively require the company to actively investtigate the employment backgrounds of all fifteen candidates to ensure that no discrimination of any form, including discrimination based on race, national origin, sex, age, disability, color, religion, or military status, influenced either their selection or non-selection. Arguably this would involve reevaluating a host of previous personnel decisions, including among other things, performance reviews, disciplinary actions, training and mentoring opportunities. In addition, where the employer has selected the pool of candidates to be considered for the promotion, it would have to separately evaluate whether others were not included in the pool because of assumed, but not alleged, illegal discrimination.

It is unrealistic to think companies can operate effectively in such a manner. To require companies to suspect discrimination at every turn, when there is no reason to believe it actually exists, imposes too onerous a burden on employers.

Many companies already devote substantial time and resources to preventing and resolving workplace discrimination complaints. EEAC's members recognized long ago that workplace discrimination not only is against the law, but also is bad for business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with

the company. Accordingly, as many of EEAC's members have found, the benefits of having programs aimed at prevention and early resolution of bias claims can far outweigh the costs.

Yet the same does not hold true here. A standard that holds employers strictly liable for subordinate bias, with the employer's only available defense being a formal investigation of every employment decision, will do nothing to encourage compliance or motivate companies to expand their prevention efforts. This is so because such investigations would be prohibitively expensive, logistically impossible, and unlikely to lead to the discovery of discrimination much beyond what is already reported by employees themselves. *Brewer v. Board of Trustees*, 479 F.3d 908, 920 (7th Cir. 2007) ("Imposing liability for employee wrongs that an employer could not practically prevent (that is, could prevent only with prohibitive expense or through unreasonable efforts) would not induce employers to impose additional controls on its employees and would therefore not be effective to avoid any harm"); *Shager*, 913 F.2d at 405 ("the ultimate concern is with confining the employer's . . . liability to the general class of cases in which he has the practical ability to head off the injury . . .").

III. REQUIRING EMPLOYERS TO EXAMINE THE MOTIVES OF EVERY INFORMANT OF POSSIBLE MISCONDUCT WOULD UNDERMINE EFFORTS TO PROACTIVELY INVESTIGATE AND RESOLVE SUCH INCIDENTS

Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings

to a more senior manager who may work in a different city or state. Often, the individual making the employment decision is not the same person who conducted the initial investigation. A rule requiring employers to question the motives of every person who reports wrongdoing so as to rule out any potential underlying bias would be extremely burdensome on these employers and invariably would undermine their efforts to address workplace misconduct. It would divert attention away from the incident being investigated, and would encourage employers to embark on fishing expeditions to uncover any and all possible workplace bias, whether or not such bias is directly related to the underlying investigation.

A conscientious employer has both an incentive and an affirmative obligation to respond appropriately to complaints of workplace bias. Courts should not prevent employers from taking action in response to clear misconduct based on the remote possibility an informant harbors a discriminatory animus in the absence of more than a mere theoretical nexus between the alleged bias and the employment decision. This is particularly true where, as here, the employee facing disciplinary action never previously complained of alleged bias on the part of the subordinate employee.

Employers who have meaningful complaint procedures in place should not be penalized for failing to investigate potential bias where the alleged victim failed to take advantage of those procedures. Punishing an employer whose decisionmaker harbored no discriminatory animus and had no reason to suspect bias on the part of a non-decisionmaking subordinate would eliminate any incentive a plaintiff might other-

wise have for reporting alleged discrimination, and thus would frustrate the primary aims and purpose of Title VII.

CONCLUSION

For all of the foregoing reasons, we respectfully request that this Court affirm the decision of the Seventh Circuit below.

Respectfully submitted,

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September 2010

AMICUS CURIAE BRIEF

No. 09-400

Supreme Court, U.S.
FILED
JUL 9 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law and its *amici* submit this brief as *amici curiae* in support of Petitioner pursuant to Sup. Ct. R. 37.3(a), on the consent of the parties. *Amici* are interested in furthering the goal of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), and other anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, to eradicate employment discrimination.[1]

The Court's decision here will seriously impact employment discrimination statutes' power to combat illegal discrimination and will directly affect the rights of employees who suffer adverse employment action not only on the basis of military service, but also on the basis of race, sex, religion, national origin, or ethnicity. As such this case impacts the constituency served by the *amici*.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The Petitioner has filed a blanket consent to the filing of all *amicus* briefs. The consent of the Respondent is being lodged herewith.

Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

AARP is a non-partisan, non-profit organization of people age 50 or older dedicated to addressing the needs and interests of older people. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. More than half of AARP's members are in the work force and are protected by the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other anti-discrimination statutes. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other employees who rely on them to deter and remedy employment discrimination. In this case, AARP's concern is that the Court should broadly construe USERRA to effectuate the congressional purpose of protecting military reservists by ensuring that adverse employment decisions are not motivated by their military status.

The Equal Justice Society ("EJS") is a national organization of scholars, advocates, and citizens that seeks to promote equality and enduring social change through law, public policy, public education, and research.

SUMMARY OF ARGUMENT

This case provides the Court with an opportunity to ensure that Congress's intent in enacting USERRA will be implemented, and that an employer can be held liable for the bias of an official, even if that official did not make the final decision, if the plaintiff proves that the bias was a motivating factor for an adverse employment practice.

Under USERRA, a plaintiff establishes an unlawful employment practice by demonstrating that an individual's military service was a "motivating factor" for an adverse employment practice, even though other factors also motivated the action. *Amici* ask the Court to hold that an employer can be held liable under the express language of USERRA for the bias of a supervisor, even when the ultimate decision-maker harbored no discriminatory motive toward the affected employee. An employer can—and should—be held liable whenever unlawful animus is a "motivating factor" in an employment decision, provided that applicable agency requirements are met.

Clarifying this principle will further USERRA's primary purpose of encouraging military service by protecting service members from employment discrimination. For, in order for the "motivating factor" language to be meaningful, USERRA must provide for employer liability for the biased actions of employees.

Well-established agency principles impute to an employer the actions of an employee committed within the scope of employment, or those that are "aided by" the agency relationship. Accordingly, an employer may be held liable for acts committed by

biased supervisors if such actions result in an adverse employment practice against an employee in a protected class. This finding of agency does not hinge on whether the biased supervisor is the ultimate decision-maker.

USERRA also gives employers a defense. Even if the jury concludes that a person's individual military service was a motivating factor, an employer still avoids liability under the statute if the employer can prove that it would have taken the same action "in the absence of" the employee's military service, which is an issue of fact that must be determined on a case-by-case basis.

ARGUMENT

I. CONGRESS ADOPTED THE "MOTIVATING FACTOR" STANDARD IN USERRA TO MAKE IT CLEAR THAT EMPLOYER LIABILITY SHOULD EXIST IN "MIXED MOTIVE" CASES

USERRA provides that an employee has established employer liability if that employee can show that the employee's "membership, application for membership, service, application for service, or obligation for service in the uniformed services is a *motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such" membership, service, obligation, or application. 38 U.S.C. § 4311(c)(1) (emphasis added).[2]

Congress adopted the "motivating factor" language in USERRA to ensure that military service, like those classifications covered under Title VII, plays no adverse roll in (or, in the words of Justice Brennan, is "not relevant" to) employment decisions. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion). The predecessor statute to USERRA had stated that an employee "shall not be denied retention in employment or any promotion or other incident or advantage of employment *because*

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[2] As this case does not present the issue, *amici* take no position on whether this standard should be applied to other employment anti-discrimination statutes. *See Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348-50 (2009) (distinguishing the Age Discrimination in Employment Act (ADEA) from Title VII because ADEA does not contain the "motivating factor" language of Title VII).

of any obligation as a member of a reserve component of the Armed Forces." 38 U.S.C. § 2021(b)(3) (emphasis added). In *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), the Court stated that the legislative history of the statute indicated it "was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotions, motivated solely by reserve status." Some lower courts thereafter interpreted the word "solely" to mean that a violation of the statute could only occur if illegal bias was the one and only cause of the employment action. *See, e.g., Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988).

Congress, however, flatly rejected this interpretation in passing USERRA. The new language was broader, replacing the "because of" standard with the "motivating factor" language. A House committee made clear that this change was no accident, but instead was a direct response to the narrow interpretation of *Monroe*:

> To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.

H.R. Rep. No. 103-65, at 24 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457. As such, Congress intended USERRA to apply so long as the discriminatory animus was a "motivating factor" for the adverse employment decision.

Congress's message in USERRA that military service should have no adverse role in employment decisions was not an aberration, but was rather entirely consistent with its treatment of discrimination under Title VII. In fact, Congress's passage of USERRA in 1994 mirrored its amendment to the Civil Rights Act in 1991. Congress adopted the "motivating factor" language for Title VII in response to the Court's *Price Waterhouse* decision that potentially narrowed the statute's reach.[3]

Two years after the Court's plurality decision in *Price Waterhouse*, Congress passed the 1991 Civil Rights Act and wrote the "motivating factor" language used by Justice Brennan into the statute.

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[3] In *Price Waterhouse*, a plurality opinion, the Justices disagreed on the proper standard to apply under the "because of" language of § 2000e-2(a). Justice Brennan's plurality opinion argued for a "motivating factor" standard, 490 U.S. at 249, Justices White and O'Connor argued that courts should consider whether a forbidden factor played a "substantial role" in the employment decision, *Id.* at 259, 269, while Justice Kennedy argued for a "but-for" causation standard. *Id.* at 282 (Kennedy, J., dissenting). The disagreement between the Justices left lower courts confused over how to interpret the statute. *See, e.g., Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 352 n.13 (1st Cir. 1989) (noting that Justice Brennan's plurality opinion in *Price Waterhouse* "casts some doubt" on the proper causation standard).

In choosing that language, Congress explicitly rejected the "but for" or "substantial" causation approach Justice O'Connor and Justice White had espoused, and endorsed Justice Brennan's "played a part" or "influence" standard instead. *See* 42 U.S.C. § 2000e-2(m). The 1991 amendment makes it clear that a plaintiff need not prove "but for" causation to show that an unlawful employment practice occurred. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m).

The legislative history of USERRA parallels the legislative history of the 1991 Amendment to the Civil Rights Act. In both cases, Congress adopted the "motivating factor" language to send a clear message to the courts that liability for employers can exist in mixed-motive cases.

II. USERRA'S PRIMARY PURPOSE IS TO ENCOURAGE NONCAREER SERVICE IN THE UNIFORMED SERVICES BY PROHIBITING DISCRIMINATION AGAINST THOSE WHO SERVE

USERRA serves the important goals of: 1) encouraging "noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service"; 2) minimizing disruption to service members by providing for their prompt reemployment once their service is completed; and 3) prohibiting "discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a).

Similar language appears in the legislative history of the statute. In discussing one of USERRA's predecessor statutes, a Senate committee stated: "Employment practices that discriminate against employees with Reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training and other[s] have been discharged because of these obligations." S. Rep. No. 1477, at 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3421, 3421.

Likewise, the Supreme Court has observed that the purpose of the USERRA line of statutes is to protect reservists from the discrimination they face in their everyday employment. In *Monroe*, Justice Stevens, writing for the majority, said of USERRA's predecessor statute: "[T]he consistent focus of the administration that proposed the statute, and of the Congresses that considered it, was on the need to protect reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations." 452 U.S. at 560.

USERRA itself sought to reaffirm this goal by strengthening the protection provided by the statute. A House committee concluded that "the primary goals of the Committee, in undertaking the revision of chapter 43, were to clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 103-65, at 18 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457. Congress did not intend for USERRA to be a narrow statute. Instead, "The Committee intends that these anti-discrimination

provisions be broadly construed and strictly enforced." *Id.* at 23, 1994 U.S.C.C.A.N. at 2456.

Just as Title VII aims to protect victims of discrimination by ensuring that a person's sex, race, religion, or national origin do not motivate an employment decision, USERRA aims to protect reservists by ensuring that a person's military status does not motivate such a decision. When considered in light of USERRA's primary purpose, it is clear that USERRA should be enforced as it is written, so that employers may be held liable whenever military status is a "motivating factor" in an employment decision, provided that applicable agency requirements are met.

III. IN ORDER FOR THE MOTIVATING FACTOR LANGUAGE TO HAVE MEANING, USERRA MUST PROVIDE FOR EMPLOYER LIABILITY FOR THE BIASED ACTIONS OF EMPLOYEES WHO ACT AS AGENTS OF THE EMPLOYER

A. Well-established agency principles apply to USERRA.

By defining "employer" to include a person "to whom the employer has delegated the performance of employment-related responsibilities," 38 U.S.C. § 4303(4)(A)(i), Congress intended that general principles of agency would apply in cases of unlawful discrimination by employers and their agents.

The Supreme Court has consistently applied agency principles in the similar context of Title VII cases. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (applying principles of

agency law under Title VII). The Court has recognized that agency principles impute to the employer the actions of a biased employee that culminate in an unlawful employment practice. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 791-92 (1998) (holding that Title VII "expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee was not otherwise obvious . . . .") (citations omitted); *Ellerth*, 524 U.S. at 754. As this Court has noted:

> An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim. . . . [D]evelopments like this occur from time to time in the law of agency.

Faragher, 524 U.S. at 798.

In addition, the lower courts routinely apply agency principles to USERRA. *See, e.g., Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 18-19 (1st Cir. 2007) (finding that discriminatory remarks of employees, even if made by non-decision-makers, can be attributed to the employer); *Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544, 552 (8th Cir. 2005) (imputing a supervisor's decision to demote an employee to the company as a whole).

B. Imputation of bias under USERRA is not properly limited to situations where the final decision-maker is biased.

The Seventh Circuit's rule is that, in discrimination cases, employers are responsible for acts that result from the animus of final decision-makers *or* the animus of an intermediate supervisor—but only if that intermediate supervisor had a "singular influence" over the final decision-maker. This rule is contrary to the plain language of the statute and is inconsistent with the Court's cases on agency.

The Supreme Court has previously recognized the applicability of the "scope of authority" and "aided by agency" forms of agency in Title VII cases. *See Faragher*, 524 U.S. at 791; *Ellerth*, 524 U.S. at 760. Limiting the application of agency principles to individuals who are the formal, ultimate decision-makers, as the Seventh Circuit has done, is inconsistent with both of those agency principles. Moreover, such a limitation would frustrate the primary purpose of the statute—to encourage noncareer service by protecting service members from discrimination—and would deprive plaintiffs of relief against employers who empower biased supervisors to cause adverse employment actions based on discriminatory motives.

Employment decisions often involve input and action by a wide range of supervisory and human resources employees. This is increasingly true today, when so many companies maintain offices in multiple locations and employ hundreds, or even thousands, of employees. Neither the plain language of USERRA, general agency principles, nor this

Court's reasoning in the similar context of Title VII limit agency to the "actual decision maker" or to the person with "principal responsibility" or to the person officially delegated to act.

C. A supervisor's actions may be imputed to an employer when they fall within the supervisor's "scope of employment" or actual authority.

The Restatement (Second) of Agency (1958) ("the Second Restatement") is a useful starting point for the content and application of general agency principles.[4] The Second Restatement provides that agency principles impute to an employer an employee's conduct when the employee's conduct occurred within the scope of his or her employment or when an employee's act has been "aided by" the agency relationship. Second Restatement § 219(1) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). The Second Restatement further states that, "[t]o be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." *Id.* at § 229(1).

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[4] *See Ellerth* 524 U.S. at 755 ("[T]he Restatement (Second) of Agency (1957) (hereinafter Restatement), is a useful beginning point for a discussion of general agency principles.") (citation omitted); *Faragher*, 524 U.S. at 792 ("[A]lthough we cautioned that 'common-law principles may not be transferable in all their particulars to Title VII,' we cited the Restatement §§ 219-237, with general approval.") (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)). Under the Restatement (Third) of Agency, actions of employees within "the scope of employment" are also imputed to employers. *See* Restatement (Third) of Agency § 7.07 (2006).

Where bias taints an employment practice through the actions of a supervisor—such as the management and evaluation of subordinate employees—long-established agency principles dictate that the bias may be imputed to the employer.[5] This is true even when the ultimate result of the lower-level supervisor's discriminatory actions is something the employer never intended, or even something the employer attempted to prevent. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (1999) (observing that the Second Restatement provided that intentional torts may be within the scope of an agent's employment "even if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results'") (citing Second Restatement § 230); *Shager v. Upjohn Co.*, 913 F.2d 398, 406 (7th Cir. 1990) (holding an employee liable "as an agent acting within the scope of his authority, even though [his] conduct was willful and unauthorized") (citing Second Restatement § 231; Prosser & Keeton, On the Law of Torts 505 (5th ed. 1984)), *cited in Faragher*, 524 U.S. at 791. An employer may well wish to prevent a supervisor from making biased reports or recommendations about a subordinate employee, but when a supervisor nonetheless does so, the supervisor's wrongful act is within his or her scope of employment because the supervisor has behaved illegally while undertaking exactly the kind of task

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[5] Although this case involves the actions of a supervisor of Mr. Staub, the applicability of agency principles is not limited to supervisors of employees subjected to adverse employment actions but rather also extends to biased employees.

the employer has authorized the supervisor to undertake.[6]

IV. "MOTIVATING FACTOR" IS THE ONLY APPROPRIATE STANDARD FOR DETERMINING WHETHER A SUPERVISOR'S DISCRIMINATORY ACTIONS CAUSED AN ADVERSE EMPLOYMENT ACTION

USERRA prohibits employers from discriminating against employees "on the basis of" the employee's military service obligations. 38 U.S.C. § 4311(a). In 1994, Congress passed USERRA to clarify the causation standard required by its

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[6] On the facts here, all the relevant actions may properly be imputed to Proctor Hospital under an actual authority analysis. Those acts include: (i) Janice Mulally's placement of Mr. Staub in the weekend rotation, creating a conflict with his drill schedule; (ii) Ms. Mulally's decision to force Mr. Staub to use his vacation time for drill days; (iii) Michael Korenchuk's derisive statements about the merits of Mr. Staub's training; (iv) Ms. Mulally's phone call to Mr. Staub's reserve unit to determine whether Mr. Staub could skip his reserve training; and (v) Ms. Mulally's written warning that accused Mr. Staub of shirking his duties, a warning that was rooted in hostility toward Mr. Staub's service. Each of the kinds of action taken by Ms. Mulally and Mr. Korenchuk were tasks of the kind Proctor Hospital had delegated to them, and thus fell within the scope of their actual authority. Ms. Mulally, as second in command at Mr. Staub's department, was authorized to determine Mr. Staub's work schedule and was further authorized to evaluate his performance. Mr. Korenchuk, as head of the department, likewise was authorized to evaluate the merits of Mr. Staub's reasons for missing his shifts. Their actions may properly be imputed to Proctor Hospital even if the hospital never gave them the authority to carry out their supervisory tasks in a discriminatory way. *See, e.g.*, *Kolstad*, 527 U.S. at 544; *Ellerth*, 524 U.S. at 756.

predecessor statute. The 1994 change makes it explicit that an employer also may be found liable when it or its agents use military service as a factor in making an employment decision.

The statute provides that an employer has engaged in a prohibited action if:

> [U]nder subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a *motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service . . . .

38 U.S.C. § 4311(c)(1) (emphasis added).

Thus, under USERRA, if a plaintiff proves that the defendant acted "on the basis of" an individual's military service by showing that unlawful bias against that service was "a motivating factor" in the employment practice at issue, the employer may be held liable.[7]

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[7] In interpreting a statute, a court must first consider whether the statutory language "has a plain and unambiguous meaning." *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If it does, the court must end its inquiry, so long as the statutory scheme is "coherent and consistent." *Id.* (internal quotation marks omitted). Whether language is plain or ambiguous "is determined by reference to the language itself, the specific context in which the language is used, and the broader context for the statute as a whole." *Id.* at 341 (citations omitted). Courts must presume that "Congress 'says in a

The "motivating factor" standard in USERRA is satisfied if a plaintiff can show that the animus of an intermediate supervisor contributed to the adverse employment action.

A. The Seventh Circuit's "singular influence" standard is contrary to the plain language of USERRA and the intent of Congress.

The Seventh Circuit relies heavily on the "cat's paw" metaphor derived from Jean de la Fontaine's fable "The Monkey and the Cat," even though M. de la Fontaine contributed far less to American jurisprudence than he did to seventeenth century French poetry. The Seventh Circuit requires a plaintiff suing for discrimination to show that the discriminatory animus of the intermediate supervisor (the "monkey" in the fable) had a "singular influence" over the ultimate decision-maker (the "cat"), who acted in "blind reliance" on the biased supervisor's opinions. This "singular influence" standard has no basis in law and conflicts directly with the "motivating factor" language of USERRA.

In USERRA, as in Title VII, "motivating factor" means that the discrimination is "shown to play a role" in the adverse employment action. H.R. Rep. No. 102-40(I), at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 586. To interpret the phrase as requiring a "singular influence" flies in the face of

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statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

the plain meaning of the statute and Congress's own clear statement of what those words mean.

Furthermore, Congress's primary purpose in enacting USERRA—to encourage noncareer service in the uniformed services by eliminating disadvantages to civilian careers—would be frustrated by the Seventh Circuit's test. The Seventh Circuit's holding allows employers to discriminate against their reservist employees and be free from liability so long as the final decision-maker did not harbor bias against that plaintiff due to his or her military status. Reservists, as a result, may often be exposed to employment discrimination in such contexts. Allowing companies to employ individuals who harbor and act on a bias against military service with impunity would contravene the statutory purpose of prohibiting discrimination.

B. The "causation" or "influence" standard of the majority of federal circuits, rather than the Seventh Circuit's "singular influence" test, is required by the plain language of USERRA and is faithful to Congress's intent.

While the lower courts have had little opportunity to address cases of "cat's paw" liability under USERRA,[8] they have analyzed such cases in other contexts, such as Title VII or the Age Discrimination in Employment Act. And in those

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[8] One exception is the Eleventh Circuit. *See Dees v. Hyundai Motor Mfg. Ala., LLC*, No. 09-12107, 2010 WL 675714, at *2 (11th Cir. Feb. 10, 2010) (analogizing USERRA to Title VII and allowing employer liability under USERRA if the employee "proves that the recommendation directly resulted in" the adverse employment action) (internal citation omitted).

cases, the Seventh Circuit is in the minority. Most courts have correctly held that bias is a "motivating factor" so long as the biased employee exerted influence over or contributed to the adverse employment decision. *See, e.g.*, *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) (holding that a subordinate's bias is imputed to the employer if the plaintiff can prove that the biased subordinate "influenced or was involved in the decision or decisionmaking process"); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001) ("[I]t is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate."); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) ("[I]t is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decision-maker."); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) ("One method [of proving pretext] is to show that discriminatory comments were made by the key decisionmaker or those in a position to influence the decisionmaker.").

Thus, the majority of circuits have understood that the "influence" or "causation" standard is in keeping with the "motivating factor" language of Title VII and USERRA. As the Ninth Circuit has recognized, courts that apply the "singular influence" test "seem[] to take the cat's paw metaphor too literally." *Poland*, 494 F.3d at 1182. Indeed, Judge Posner of the Seventh Circuit Court of Appeals, who coined the "cat's paw" phrase in the Seventh Circuit's opinion in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), has recently complained that courts

employing a "substantial influence" test misapply the original "cat's paw" formula: "The formula was (obviously) not intended to be taken literally ([the employer] employs no felines), and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation." *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004).

V. APPLICATION OF THE "MOTIVATING FACTOR" STANDARD OF CAUSATION WILL NOT DEPRIVE EMPLOYERS OF A DEFENSE TO LIABILITY

Consistent application of the "motivating factor" causation standard would significantly clarify the substantive rights of employers and employees in employment discrimination cases. As a practical matter, however, it would not alter the procedural landscape and employers would still have a defense if they have not acted unlawfully.

To prevail under a motivating factor analysis, the employee must demonstrate the following: (i) supervisor bias; (ii) an agency relationship to impute liability to the employer; and (iii) that the supervisor's action was a motivating factor for the ultimate employment decision. *See* 38 U.S.C. §§ 4303(4), 4311(c)(1). A jury must therefore conclude that an improper discriminatory intent was a motivating factor.[9] Under USERRA, the employer is free from liability if "the employer can prove that the action would have been taken in the absence of such

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[9] At any time during the litigation, the trial court can, of course, apply the appropriate summary judgment analysis and determine whether there are contested issues of material fact warranting a decision by the fact finder and, if not, dismiss the claim.

membership, application for membership, service, application for service, or obligation for service. . . ." 38 U.S.C. § 4311(c)(1). Thus, assuming that the jury concludes that discrimination was a motivating factor, in appropriate cases the employer may still be able to limit its exposure if it can prove that it would have taken the same action "in the absence of" the protected classification, *i.e.*, if the employer can prove that the causal chain between the discriminatory conduct and the employment decision has been broken.

VI. IN EMPLOYMENT DISCRIMINATION CASES, EMPLOYER LIABILITY IS NECESSARILY BASED ON FACTUAL DETERMINATIONS, THUS FORM CANNOT BE ELEVATED OVER SUBSTANCE

The Seventh Circuit's "singular influence" standard is problematic for another reason. It elevates form over substance by allowing that an internal investigation—whether robust or completely inadequate—is enough to break any causal link between discriminatory animus and an adverse employment decision. As the court below noted:

> We admit that Buck's investigation could have been more robust, *e.g.*, she failed to pursue Staub's theory that Mulally fabricated the write-up; had Buck done this, she may have discovered that Mulally indeed bore a great deal of anti-military animus. But the rule we developed in *Brewer* does not require the decisionmaker to be a paragon of independence. It is enough that the decisionmaker "is not

> wholly dependent on a single source of information" and conducts her "own investigation into the facts relevant to the decision."

(JA 51a) (citation omitted)

Although an independent investigation of potential bias may be sufficient to break the causal chain in one case, it may be woefully insufficient in another, depending on the facts and circumstances of each case. As the unanimous Court so aptly explained in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006), "[c]ontext matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships . . . .'" (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998)). What investigation an employer may, or may not, have performed may have relevance. Ultimately, the "context" in which the action takes place "matters" and requires a case-specific analysis that judges and juries can effectively perform.

The employment relationship is unique to each employer and its employees. And the facts surrounding "routine" employment decisions vary from workplace to workplace and from employee to employee. Although courts are not "super-personnel departments," they are charged with reviewing employment decisions that involve discrimination. *See Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006) (citing *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995)). There is no one type of investigation that, based on

its mere existence, should insulate the employer from liability.[10]

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[10] Nor may Respondent insulate itself from liability based on the mere existence of anti-discrimination policies. Courts have flatly rejected formalistic approaches that allow employers to insulate themselves from liability while permitting discrimination to continue. *See, e.g., Vinson*, 477 U.S. at 72 ("[W]e reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive."); *see also Russell*, 235 F.3d at 227 n.13 ("If . . . we adhered to a rigid formalistic application, employers could easily insulate themselves from liability by ensuring that the one who performed the employment action was isolated from the employee, thus eviscerating the spirit of the 'actual decisionmaker' guideline."); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998) (holding that the "[decision-maker] rule was never intended to apply formalistically, and [thus] remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, [are] relevant"). Furthermore, there is no guarantee that a workplace policy would be effective in preventing and rooting out discrimination. Some researchers suggest that many of these policies are no more than symbolic statements against discrimination, with no practical or deterrent effect. *See* John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 Am. Soc. Rev. 794, 800 (1996); Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 Law & Soc'y Rev. 497, 511 (1993).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and make clear what Congress already has made clear in USERRA: an employer can be held liable for the bias of a supervisor if the bias was a motivating factor for an adverse employment practice.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 07 2010
OFFICE OF THE CLERK

No. 09-400

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PROCTOR HOSPITAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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September 7, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The National Federation of Independent Business ("NFIB") Small Business Legal Center is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.[1] NFIB is

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than NFIB, its members or its counsel made a

the nation's leading small-business association, with offices in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide.

The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent-setting cases that will impact small businesses nationwide.

The issue presented in this case is of critical importance to small business. Small businesses need a clear standard that provides certainty and predictability for the employer when taking adverse employment action. A clear standard is important to small businesses as they often lack the ability of larger organizations to parse the language of complicated legal standards before making decisions that could expose them to significant liability. Additionally, small business owners often rely on many people in the chain of command when making employment decisions and may often follow informal information-gathering procedures. Under the standards enunciated by certain courts of appeal on the issue before the Court, the small business owner in many instances would find himself in a position of facing liability if any one of the employees consulted prior to an adverse employment action were shown to harbor any discriminatory animus.

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monetary contribution intended to fund the preparation or submission of this brief. Petitioner has filed with the Court a consent to the filing of all *amicus curiae* briefs. Consent of Respondent to the filing of this brief has been filed herewith.

This case provides a perfect opportunity for the Court to enunciate a judicial standard that provides clear guidance to employers on how to make necessary employment decisions while complying with the law and growing a business.

STATEMENT OF THE CASE

Vincent Staub worked as an angiography technologist at Proctor Hospital. *Staub v. Proctor Hosp.*, 560 F.3d 647, 651 (7th Cir. 2009). He also was in the United States Army Reserve. *Id.* His Army Reserve duties required him to attend drill and training sessions one weekend out of every month and for two weeks during the summer. From 1990 to 2000, these obligations posed no problem with his work. *Id.* at 651.

In 2000, Janice Mulally came into a supervisory role over Mr. Staub and expressed displeasure with his participation in the Army Reserve. *Id.* She scheduled him for work on weekends, which interfered with his Army Reserve duties. *Id.* Ms. Mulally also questioned the legitimacy of Mr. Staub's Army Reserve duties. *Id.* at 652.

Mr. Staub went to department head Michael Korenchuk about the issue but did not get meaningful relief. *Id.* at 651. Mr. Korenchuk also appears to have harbored animus toward the Army Reserve. *Id.* at 652.

In January 2004, Mr. Staub received an order to report for "soldier readiness processing" as a precursor to a deployment. *Id.* Mr. Staub gave Ms. Mulally and Mr. Korenchuk a copy of the order, and Mr. Korenchuk became apprehensive. *Id.* He asked Mr. Staub repeatedly when he would be shipping out. *Id.* Mr. Staub was one of only two angio techs at Proctor,

and his departure would require Proctor to take on temporary angio techs at an increased cost. *Id.*

Later in January 2004, Ms. Mulally gave Mr. Staub a written warning for failing to respond to a request by Ms. Mulally to lend a hand on some open projects when he had available time. *Id.* at 653. Mr. Korenchuk signed the warning. *Id.* The warning required Mr. Staub to report to Ms. Mulally or to Mr. Korenchuk when he had no patients and to remain in the general diagnostic area at all times. *Id.*

On April 20, 2004, Mr. Staub worked in the angio department all morning and finished his work around lunchtime. *Id.* at 654. He then left Mr. Korenchuk a voicemail that he was going to get some lunch. *Id.* When Mr. Staub returned from lunch, Mr. Korenchuk demanded to know where he had been. *Id.* Mr. Staub's explanation that he had left a voicemail for Mr. Korenchuk was insufficient. *Id.* Mr. Korenchuk immediately escorted Mr. Staub to the office of Human Resources Vice President Linda Buck. At that meeting, Ms. Buck notified Mr. Staub that he was being terminated for failing to follow the terms of the January warning. *Id.* In fact, the termination decision had been made earlier that day. *Id.*

There is no dispute that Ms. Buck alone made the decision to terminate Mr. Staub. *Id.* There is also no dispute that Ms. Buck harbored no anti-military animus. *Id.* In coming to the termination decision, Ms. Buck reviewed Mr. Staub's personnel file. *Id.* at 655. Mr. Staub's reviews were mixed. While his performance was technically competent, his reviews noted that he had problems getting along with colleagues and that he had a tendency to disappear

during scheduled hours and not help out during idle time in the angio department.

Ms. Buck also relied on her personal knowledge of past issues with Mr. Staub, including her knowledge: (1) of several complaints about Mr. Staub during her first year with Proctor in 2001; (2) that two Proctor employees had resigned in 2002 because of Mr. Staub; and, (3) that a recruiter had told Ms. Buck that she was having difficulty attracting workers to the angiography department because Mr. Staub was known for unwelcome "flirting" with medical students and "had a reputation" with female colleagues for unwelcome conduct. *Id.* at 654. Ms. Buck had no idea that Ms. Mulally wanted Mr. Staub fired. *Id.* at 654-55.

Mr. Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights Act, which, like Title VII and other employment-discrimination statutes, prohibits adverse employment action because of an individual's protected classification—in Mr. Staub's case, his service in the Army Reserve. *Id.* at 655. Mr. Staub won his case at trial. The jury found that Ms. Buck made the decision to terminate Mr. Staub but that Ms. Mulally's anti-military animus heavily influenced that decision and was therefore properly imputed to Ms. Buck and to Proctor. *Id.* at 655. The trial court denied Proctor's motion for a new trial or for judgment as a matter of law. *Id.* at 655.

The Court of Appeals for the Seventh Circuit set aside the jury's verdict and entered judgment for Proctor. The Seventh Circuit reiterated the rule in that circuit that a non-decisionmaker's unlawful animus may be imputed to the decisionmaker only if the decisionmaker was "wholly dependent on a single

source of information." *Id.* at 656 (internal quotations omitted). However, if the decisionmaker "conducts its own investigation in the facts relevant to the decision, the employer is not liable" for a non-decisionmaker's unlawful animus. *Id.* Here, although Ms. Mulally and Mr. Korenchuk contributed to Ms. Buck's decision to terminate Mr. Staub, the decision was informed by many other pieces of information, including Ms. Bucks' review of Mr. Staub's personnel file, her personal knowledge of Mr. Staub's attitude problems and interpersonal issues at Proctor, and tales from other Proctor employees who worked with Mr. Staub about problems they encountered working with him.[2] *Id.* at 659.

According to the Seventh Circuit, the law "does not require the decisionmaker to be a paragon of independence. It is enough that the decisionmaker was not wholly dependent on a single source of information." *Id.*

SUMMARY OF ARGUMENT

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits adverse employment action based on an employee's membership or service in the armed forces. Like other federal anti-discrimination laws that address race, gender, disability, and other protected classifications, USERRA creates a scheme that proscribes disparate treatment on the basis of service in the armed forces.

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[2] Because the Seventh Circuit found that Ms. Buck's termination decision was not "wholly dependent" on Ms. Mulally or Mr. Korenchuk, it held that evidence of their animus should not have been admitted at trial. And because that leaves Ms. Buck as the lone decisionmaker who admittedly harbored no discriminatory animus, judgment for Proctor was appropriate.

Petitioner, in his Petition for a Writ of Certiorari, concedes that judicial interpretations of other federal anti-discrimination laws govern resolution of this case.

Under Title VII of the Civil Rights Act, which has one of the largest bodies of decisional law in the federal courts, the disparate treatment standard prohibits adverse action taken with the intent or motive to discriminate. In creating a disparate treatment cause of action, Congress did not intend a scheme of strict liability in which intent is irrelevant; nor did Congress proscribe or seek to penalize adverse employment action devoid of discriminatory intent. Thus, the unlawful animus must reside in the person taking the adverse action.

The requirement of unity of animus and action has caused a split in the circuits regarding the proper standard to govern when the animus of a non-decisionmaker may be imputed to the decisionmaker and on to the employer. Several circuit courts of appeal that have confronted the issue of subordinate bias have developed a "causation" and "influence" standard. Under these standards, the unlawful animus of a non-decisionmaker may be imputed to the decisionmaker if the non-decisionmaker was a cause in fact of, or influenced in some way, the adverse employment action.

These standards are problematic because they focus on the employee who possesses the animus rather than on the employer and the decisionmaker who are in a position to modify their behavior to comply with the law. These standards also are inconsistent with anti-discrimination law insofar as they allow a plaintiff to graft the animus of a non-decisionmaker onto the actions of a decisionmaker

merely by showing that somewhere in the adverse decisional process, a biased employee provided information to the decisionmaker. This essentially reads a strict liability standard into disparate treatment law, which Congress did not intend. These standards also fail to consider the realities of the workplace, where information always flows up the chain of command to decisionmakers. Under the standards of these courts, an adverse employment action is forever tainted if an employee who later is shown to harbor unlawful animus reports a fact or writes a report that puts into motion events that led to an adverse employment action.

The realities of the small-business workplace require a clear employer-focused standard that provides certainty for employers making adverse employment decisions.

NFIB therefore agrees with the Seventh Circuit's two-step approach in this case which correctly places the focus on the decisionmaker rather than on other employees who may have contributed in some way to the decision. To admit the animus of a supervisor or other employee under the Seventh Circuit's approach to subordinate bias cases, a plaintiff first must demonstrate that the decisionmaker was "wholly dependent" on a single source of information. That is, the plaintiff must prove that the decisionmaker did not act independently and thus there were in fact multiple decisionmakers. Next, if the plaintiff satisfies this, the plaintiff will be permitted to introduce evidence of unlawful animus held by the supervisor or other employee upon whom the decisionmaker was wholly dependent. This standard provides small businesses much-needed clarity and certainty by placing the focus on the decisionmaker and his or her

actions. The Seventh Circuit's standard permits employers and their decisionmakers to modify their behavior to avoid liability.

The Seventh Circuit held that Ms. Buck's investigation into the facts, which revealed ample evidence supporting Mr. Staub's termination, was sufficient to demonstrate Ms. Buck's independence. While an employer investigation into the facts is certainly one way to demonstrate that the decisionmaker acted independently, it should not be necessary in every case. For example, an investigation should not be necessary when an employee's terminable offense is open, apparent, and obvious. Similarly, no investigation should be necessary when a company has an automatic termination policy, such as a zero-tolerance policy for guns or drugs, a three-strikes policy, or a uniformly-applied no-fault absence policy.

ARGUMENT

I. DISPARATE TREATMENT CLAIMS REQUIRE PROOF THAT AN EMPLOYER INTENDED TO DISCRIMINATE AGAINST A PLAINTIFF

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits adverse employment action based on an employee's membership or service in the armed forces. 38 U.S.C. § 4311(a). An employer violates USERRA if the employee's activity in the armed forces is a motivating factor in the adverse employment action. *Id.* at 4311(c)(1). Like other federal anti-discrimination laws that address gender, sex, disability and other protected classifications, USERRA creates a scheme that proscribes disparate treatment on the basis of service in the armed forces. Petitioner concedes that

the standards applied by the federal courts for disparate treatment claims under Title VII and other anti-discrimination laws apply to this case. *See* Petition for a Writ of Certiorari.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which contains the disparate treatment standard, prohibits adverse action with the intent or motive to discriminate. The words "intent" and "motive" are used interchangeably in Title VII jurisprudence. In creating a disparate treatment cause of action, Congress did not enact a scheme of strict liability. Nor did Congress prohibit or seek to penalize conduct void of discriminatory intent.

Under Title VII, an employee may bring a claim against an employer for disparate impact or for disparate treatment. *E.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617 n.2 (1999) (Thomas, J., dissenting) ("This Court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact."). *See also Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005) (Plaintiff brought both a disparate treatment claim and a disparate impact claim). This case involves a claim for disparate treatment, as do all cases that involve the issue of subordinate bias, which the Seventh Circuit Court of Appeals has dubbed "cat's paw" cases. *Proctor Hosp.*, 560 F.3d at 650.

For a plaintiff to survive summary judgment in a disparate treatment claim, he or she must show that the decisionmaker, not just any employee, took adverse action with discriminatory intent. *E.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Tex. Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In *Reeves*, this Court held

that the ultimate question is whether the employer intentionally discriminated. 530 U.S. at 146. The first step in the Court's analysis was to determine the motives of the several decisionmakers. *Id.* at 140 (noting that there were no allegations that two of the decisionmakers were motivated by age). Thus the Court's focus in disparate treatment cases is on the motives of the decisionmakers and who should be considered a decisionmaker.

The element of motive or intent is integral to disparate treatment claims. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72 (2006) ("Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory . . . and punitive damages"); *Reeves*, 530 U.S. at 143; *Burdine*, 450 U.S. at 256; *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278-79 (1979); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). In *Reeves*, this Court held that "'liability depends on whether the protected trait . . . actually motivated the employer's decision.'" 530 U.S. at 141 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court held that the plaintiff could show that McDonnell Douglas' proffered reason for refusal to rehire was pretextual by showing that McDonnell Douglas exhibited racial discrimination during Mr. Green's previous employment, or by showing that McDonnell Douglas rehired whites with a similar criminal background. Mr. Green was arrested and convicted for illegally blocking traffic at the entrance of McDonnell Douglas' worksite. He then applied for re-employment. Thus, the burden remains with the plaintiff to show that the person making the adverse employment decision took the plaintiff's protected

status into consideration. *See Reeves*, 530 U.S. at 143 (holding that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") (alteration in original) (internal quotations omitted).

"'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279. Rather, to show intentional discrimination, a plaintiff must show that the "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" the protected characteristic. *Id.*

A. Disparate Treatment Claims Require Proof of Unlawful Motive or Intent by the Person Taking the Adverse Employment Action

The essence of a disparate treatment claim under the federal anti-discrimination laws is discriminatory motive or intent by the decisionmakers taking an adverse action. *E.g.*, *Burlington N.*, 548 U.S. at 72.

In contrast to disparate treatment claims, disparate impact claims operate under a scheme more similar to strict liability, as the question of unlawfulness centers upon the result and disregards the motivation of the decisionmaker. Disparate impact claims recognize that an employer may violate Title VII even without intending to discriminate. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Eliminating a plaintiff's burden to prove the decisionmaker's discriminatory intent in essence converts cat's paw cases from disparate treatment claims to disparate impact

claims, as the intent or motive of the decisionmaker would no longer matter. Congress did not wish for this when it enacted two distinct schemes of liability.

In the instant case, the Seventh Circuit correctly looked to the motive or intent of the lone decisionmaker, Ms. Buck. Under the two-step framework set forth in the case, only if Ms. Buck was wholly dependent on the biased information such that it became her own would the animus of Ms. Mulally or Mr. Korenchuk be a material issue.

B. A Plaintiff May Not Graft the Discriminatory Motive or Intent of a Non-Decisionmaker onto the Decisionmaker's Adverse Action

Because a disparate treatment plaintiff is required to show that the decisionmaker harbored a discriminatory motive, cat's paw cases would appear to be easily dispensable simply by showing that the decisionmaker harbored no discriminatory animus. Indeed, the *sine qua non* of a cat's paw case is the decisionmaker's neutrality. Cat's paw cases are not easy to resolve, however, because the decisionmaker's level of independence from employees who harbored discriminatory animus varies from case to case. All circuit courts of appeal that have confronted the issue agree on this.

What is clear, however, is that a plaintiff cannot prevail merely because he or she can show, without more, that discriminatory animus resided in one person and an adverse action was taken by another person. This was the case here, where Ms. Mulally and Mr. Korenchuk harbored anti-military animus, but Ms. Buck made the termination decision.

However, when the neutral decisionmaker relies exclusively on information that comes from a biased employee or otherwise is wholly dependent on a biased employee's report or recommendation, the cat's paw cases become more difficult as the decisionmaker begins to lose his or her independence from the biased information. This creates the appearance that the decisionmaker and the biased subordinate form a collaborative of interdependent decisionmakers. This is the zone in which the circuit courts of appeal have struggled and have arrived at different standards for resolution.

NFIB believes that the proper standard to guide small businesses should focus on the decisionmaker's conduct rather than on the universe of other employees who may harbor unlawful animus. Only then will employers know what the law expects of them and be in a position to comply.

C. The Court's Inquiry Should Focus on the Independence of the Decisionmaker, Not Upon Whether a Biased Non-Decisionmaker *Caused* or *Influenced* the Decisionmaker

The courts of appeal are split over the proper standard to employ to determine when an employer is liable for the discriminatory animus of its employees. The Courts of Appeal for the Sixth, Ninth, and Tenth Circuits employ a factual causation standard, under which an employer will be held liable if a biased non-decisionmaker *caused* the adverse employment action. *E.g.*, *Madden v. Chattanooga City Wide Service Dep't*, 549 F.3d 666 (6th Cir. 2008); *Gilbrook v. City of Westminster*, 137 F.3d 839, 854 (9th Cir. 1999); *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476 (10th Cir. 2004).

The Court of Appeal for the First, Second, Third and Fifth Circuits have adopted a slightly different, though related, standard, which looks at whether a biased employee *influenced* the decisionmaker. *E.g.*, *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 285 (3d Cir. 2001).

1. The causation and influence standards provide no meaningful guidance to employers and fail to consider the realities of the workplace

Focusing on the biased non-decisionmaker and whether his or her action *caused* or *influenced* the adverse employment action fails to provide guidance to employers on how to change their own behavior to make sure they stay on the right side of the law. A neutral decisionmaker may be fully unaware of the improper influence being exerted upon her. Rather than give certainty to employers on how to avoid missteps—and protracted litigation—in handling sensitive employment decisions, the causation and influence standards leave employers in the dark on what their employment decisionmakers should do to ensure that terminations and other adverse employment actions are lawful.

The causation and influence standards also fail to distinguish instances in which a supervisor's influence is proper. All supervisors—and in some instances regular employees—direct information upward to decisionmakers. To be helpful, a legal standard must distinguish between instances in which a decisionmaker, through his or her complete depen-

dence on biased information, assumes the discriminatory animus of the biased supervisor from instances in which the decisionmaker acts independently.

The decisionmakers in employment settings often do not have direct supervisory authority over the affected employee. That falls to the supervisors that are put in place to relay information up the chain of command. Under the causation and influence standards, any time information flows from an individual up the chain of command, the individual from which the information flowed will necessarily be a but-for cause or an influence of any adverse employment decision. This will be the case regardless of the steps the decisionmaker takes along the way to satisfy him or herself that the termination is justified. Such a standard leaves the employer completely exposed to liability whenever a plaintiff later discovers an unlawful animus in the supervisor who directed information upward to the decisionmaker. As stated, *supra,* this takes on the underpinnings of a strict liability standard for a claim that has always required intent or motive. *Burlington N., supra.*

2. The causation and influence standards do not comply with anti-discrimination laws

Moreover, the causation and influence standards do not comport with the principles of anti-discrimination jurisprudence. These standards presume that a court is permitted in the first instance to graft one person's unlawful motive onto the actions of a concededly non-biased person. This premise has no roots in anti-discrimination law. For example, Title VII prohibits an adverse action "because of" an individual's protected status. 42 U.S.C. § 2000e-2. This Court has construed the words "because of" to mean

that protected status must be irrelevant to the employment decision. *Price Waterhouse*, 490 U.S. at 240. In *Price Waterhouse*, the Court held that to construe "because of" to mean "but-for causation" "is to misunderstand" the statutory language. *Id.* A but-for causation analysis, the Court held, incorrectly asks whether an employer would have terminated an employee if the protected status was not present. *Id.* According to the Court, the critical inquiry is "the one commanded by the words of" the statute—whether protected status "was a factor in the employment decision *at the moment it was made*." *Id.* at 241.

Cautioning that we "need not leave our common sense at the doorstep when we interpret a statute," the Court reasoned that in drafting the words "because of," Congress did not require a plaintiff to identify a precise causal role played by discriminatory motives. *Id.* at 241. Rather, the Court concluded that Congress intended to require a plaintiff to prove that the employer "relied upon sex-based considerations in coming to its decision." *Id.* at 241-42. Congress did not intend to allow a plaintiff to take a short cut in his burden by attributing a supervisor's bias to an employer merely because the supervisor's conduct was a but-for cause of a particular result. Instead, Congress intended a more rigorous burden to show improper considerations were a factor in the decision.

Because Title VII and USERRA prohibit only conduct by an employer, the inquiry should focus upon the decisionmaker—the individual empowered to bind the employer through adverse employment decisions. Not only would this approach respect the principles of Title VII, it would also provide much-needed guidance to the small-business community on

how best to manage employment decisions. The small business community is most in need of a standard that sets forth a clear bright line for employers. A standard that clearly defines what the law expects of the decisionmaker would go a long way to minimize needless litigation costs so that small business owners can stay focused on growing their business.

3. The Seventh Circuit's "wholly dependent" standard complies with anti-discrimination laws and provides meaningful guidance to employers

The Seventh Circuit's "wholly dependent" standard is a good framework from which this Court can build a fully-functioning legal principle to guide employers. The Seventh Circuit correctly placed the focus of the inquiry on the decisionmaker by asking what he or she has done during the decisional process and whether that comports with the law. The converse of "wholly dependent" is independent, and the principle of independence should guide the Court here.

That is, courts should inquire whether the decisionmaker made the adverse employment decision independently. If so, then the animus of non-decisionmakers is of no consequence. However, if the decisionmaker did not act independently, and was "wholly dependent" on the word of a biased employee or supervisor, then the bias of that employee becomes relevant in the analysis. In such a case, the decisionmaker and the biased employee can be said to have acted interdependently in the decisional process, and courts may conclude that the biased employee has become one of a collaborative of decisionmakers. Once a court makes this determination,

it would be appropriate to permit evidence of the new decisionmaker's animus.

II. DIFFERENT FACTUAL SITUATIONS IN THE WORKPLACE REQUIRE A FLEXIBLE APPROACH TO DETERMINING THE INDEPENDENCE OF THE DECISIONMAKER

All discrimination disputes can be broadly divided into three factual patterns. In the first class of cases, the decisionmaker harbors the animus, and plaintiff alleges that the adverse employment decision was motivated by that animus. *See, e.g., McDonnell Douglas, supra.* In these cases, the decisionmaker's animus is rightly imputed to the employer.

In the second class of cases, the biased individual has no supervisory or disciplinary authority over the employee against whom adverse action is taken. Expressions of animus by these individuals are mere "stray remarks," and they may not be imputed to the employer. In *Price Waterhouse*, 490 U.S. at 277, this Court stated that stray remarks, "cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard."

Although the Fourth Circuit did not characterize it as such, the facts of *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), fall within the "stray remarks" doctrine. In that case it was undisputed that the allegedly biased safety inspector who reported Ms. Hill's violations of company policy had no supervisory or disciplinary authority over

Ms. Hill. *Lockheed Martin*, 354 F.3d at 282. Rather, the safety inspector merely reported violations to Ms. Hill's supervisor, who possessed disciplinary—but not termination—authority. *Id.* It was also undisputed that none of Hill's four direct supervisors harbored any age-based animus. *Id.* at 282-83. Using similar reasoning to the "stray remarks" doctrine of *Price Waterhouse*, the Fourth Circuit rightly concluded that the safety inspector's bias could not be attributed to the employer. *Id.* at 296.

In the third class of cases, where we presently find ourselves, an allegedly-biased supervisor with disciplinary but not termination authority, reports to someone up the chain of command who possesses termination authority. In these cases, the approach most faithful to Title VII is to follow the Court's analysis in *Reeves* and the Seventh Circuit's approach in this case and look to the independence of the decisionmaker's action. In *Reeves*, Ms. Sanderson was the decisionmaker who fired Mr. Reeves, but evidence presented by Mr. Reeves showed Mr. Chesnut also to be a decisionmaker. *Reeves*, 530 U.S. at 152. The Court implicitly determined that Ms. Sanderson did not act independently but rather acted *inter*dependently with Mr. Chesnut. *Id.* Once the Court was satisfied that Mr. Chesnut was a decisionmaker, it followed that his animus could be imputed to the employer. Similarly, in the instant case, Ms. Buck was the decisionmaker who terminated Mr. Staub. 560 F.3d at 654. However, Mr. Staub's supervisors Ms. Mulally and Mr. Korenchuk allegedly harbored anti-military animus. The Seventh Circuit analyzed whether Ms. Buck's decision was "wholly dependent" on Ms. Mulally or whether Ms. Buck acted independently. *Id.* at 659. The Seventh Circuit

looked at the independent actions Ms. Buck took to ensure that the termination was warranted and concluded that Ms. Buck was not wholly dependent on Ms. Mulally and Mr. Korenchuk. *Id.*

The approach NFIB advocates here does not require a determination of who the principal decisionmaker is, for there may be several decisionmakers who all played an equal role throughout the chain of command. NFIB proposes that, through the "wholly dependent" analysis, courts identify the individual or the group of individuals who acted as decisionmakers. Because the titular decisionmaker will always be included in this class, the most practical approach is to look to facts not in dispute to show that the titular decisionmaker made an independent decision. If the titular decisionmaker acted independently, then the animus of non-decisionmakers is irrelevant. However, if the titular decisionmaker did not make the adverse employment decision independently, at least one other employee is necessarily part of a group of decisionmakers, and that person's animus may be imputed to the employer.

To determine independence courts may look to several undisputed facts in the record. For example, the fact that the formal decisionmaker conducted an inquiry would always be sufficient to show the independence of the formal decisionmaker. However, an inquiry is not always necessary. Factual situations vary widely, and the law should be clear yet permit employers the flexibility to deal with cases in the most efficient and appropriate method. In these cases, courts should defer to the business judgment and experience of human resource professionals.

A. The Decisionmaker May Demonstrate Independence by Conducting an Investigation

In *BCI Coca-Cola*, the Tenth Circuit held that a defendant cannot prevail on summary judgment unless it conducted an investigation that was "adequate" as a matter of law. In the court's view, an adequate investigation must consist, at a minimum, of asking the employee for his side of the story. *BCI Coca-Cola*, 450 F.3d at 488, 492. Because Ms. Edgar did not directly ask Mr. Peters his side of the story prior to his termination, the court held that BCI Coca-Cola did not conduct an adequate investigation and reversed the district court's grant of summary judgment. The Tenth Circuit's holding is wrong for two reasons.

First, the Tenth Circuit's "adequate investigation" standard is overbroad. It erroneously imposes a strict legal standard for a factual question best left to the discretion of employers and human resources professionals. The Seventh Circuit got this correct, holding instead that an employer can demonstrate independence merely by "conducting its own investigation into the facts relevant to the decision." *Proctor Hosp.*, 560 F.3d at 656 (quoting *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 918 (7th Cir. 2007)). According to the Seventh Circuit, "[b]y asking whether the decisionmaker conducted her own investigation and analysis, we respected the role of the decisionmaker." *Id.* at 656.

NFIB proposes that an investigation be defined as any active search for evidence probative of the reliability of the non-decisionmaker's stated grounds for an adverse employment action. If the decisionmaker makes such an inquiry, then she has estab-

lished that she independently made her decision, and was not "wholly dependent" on the supervisor's report, and the supervisor's animus becomes irrelevant. In the instant case, Ms. Buck conducted an investigation into the facts presented by Ms. Mulally and Mr. Korenchuk, and she satisfied herself that termination was warranted. *Id.* at 654-55. Ms. Buck reviewed Mr. Staub's personnel file and drew on her own several years of rather extensive personal knowledge of Mr. Staub's behavior. *Id.* In that investigation, she found evidence that affirmed her decision that termination was appropriate. The Seventh Circuit reached the same result in *Brewer*, 479 F.3d at 919, in which it declined to impute a non-decisionmaker's animus to the employer because the decisionmaker did not simply rely on the information from the biased employee but looked into the situation for herself and confirmed that termination was appropriate.

B. There are Numerous Other Ways to Demonstrate Independence

The collective experience of the small business community teaches that an investigation, while always sufficient to show independence, is not always necessary. Rather, small business professionals need the flexibility and latitude to handle employment decisions in an efficient and responsible manner. Often times, an investigation will not be the best way to establish the decisionmaker's independence.

1. Termination under a policy of automatic termination (*e.g.*, a zero-tolerance policy)

Some facts leading to an adverse employment decision are so apparent that no investigation is required

by the decisionmaker before taking the contemplated action. For example, a company may have a zero-tolerance drug policy in place and requires routine testing pursuant to a written policy. If the supervisor receives the lab results showing that the employee tested positive and forwards the results to the decisionmaker who promptly terminates the employee, no claim should lie against the employer even if the supervisor harbored unlawful animus. The termination decision was based entirely on the facts of the zero-tolerance drug policy and the positive test results. Under these circumstances, the supervisor's forwarding of the test results could hardly be said to compromise the independence of the formal decisionmaker's action.

In addition to policies of automatic termination, NFIB's experience is that, in the field of occupational safety and health, a decisionmaker may decide immediately to terminate an employee for a safety infraction. In such cases, the decisionmaker should be given the latitude to do so without investigation—even if the decision is based entirely on a supervisor's report—if in doing so the decisionmaker acted in good-faith furtherance of the safe and healthful conditions of the workplace.

Lockheed Martin and *BCI Coca-Cola* are examples of this situation. In *Lockheed Martin*, Ms. Hill did not dispute the basis for any of the three reprimands issued to her by the "lead person" (Ms. Hill's direct supervisor). *Lockheed Martin*, 354 F.3d at 283. Of the three reprimands, one included a suspension. *Id.* at 282. Company policy provided that "an employee who receives a combination of two reprimands not involving a suspension and one involving a suspension . . . will be subject to discharge." *Id.* Upon

issuing Ms. Hill her third reprimand, Mr. Dixon, the lead person, contacted the human resources department and inquired how to proceed under the automatic termination policy. *Id.* Mr. Dixon was told to follow company policy, which he did by forwarding Ms. Hill's disciplinary paperwork to his own supervisors who made the decision to terminate Ms. Hill. *Id.* Under these facts, in which the formal decisionmakers were acting pursuant to a policy of automatic termination, a thorough investigation was not necessary. However, Mr. Dixon's supervisors—the formal decisionmakers—did conduct an inquiry inasmuch as they reviewed Ms. Hill's file. This satisfied the court that they arrived at their decision independently.

2. The non-decisionmaker does not advocate but merely reports facts to or seeks advice from the decisionmaker

Courts also should look to the strength of the biased non decisionmaker's advocacy as an indicator of whether the supervisor's behavior tends to make him or her one of several interdependent decisionmakers. In cases in which the supervisor in effect becomes an advocate for a particular decision, the court may need to look further for facts relating to the formal decisionmaker's independence. However, where a supervisor merely reports facts or seeks advice from the decisionmaker, an investigation should be unnecessary. The non-decisionmaker's only role in this scenario is to convey or receive information, not to influence the formal decisionmaker. Thus, there is no threat to the independence of the formal decisionmaker's actions.

In the leading cases in which the employee subordinate to the formal decisionmaker strongly advocated

for the adverse employment decision, the reviewing court denied summary judgment for the employer. In *Reeves*, "Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that petitioner and Caldwell be fired." 530 U.S. at 138. In *McKinney Hosp. Venture*, Mr. Ciulla, the non-decisionmaker, gave Ms. Jacobsen, the decisionmaker, "an ultimatum . . . that he would quit if Russell were not fired." 235 F.3d at 224.

In *Lockheed Martin* and this, the non-decisionmakers did not advocate for a particular result but merely presented facts to the human resource department. The Fourth Circuit affirmed summary judgment for the employer in *Lockheed Martin* and the Seventh Circuit entered judgment for Proctor in this case. In *Lockheed Martin*, after Ms. Hill received her third reprimand which, under company policy, required automatic termination, her supervisor, Mr. Dixon, contacted his own supervisor, Mr. Griffin, to apprise him of the situation and "to obtain guidance on how to proceed." 354 F.3d at 282. Mr. Griffin instructed Mr. Dixon to proceed under company policy, which required forwarding Ms. Hill's disciplinary paperwork to Mr. Griffin who, along with Mr. Prickett, made the decision to terminate Ms. Hill. *Id.* At no time did Mr. Dixon suggest or recommend to his superiors that Ms. Hill be terminated; rather, as the opinion makes clear, his contact with Mr. Griffin was limited to obtaining guidance on how to deal with a delicate employment matter. Thus, Mr. Dixon cannot be found to be a part of a collaborative of independent co-decisionmakers. Further, in the absence of advocacy, there is no evidence that Mr. Griffin was "wholly dependent" upon Mr. Dixon.

In the instant case, it appears that Ms. Mulally had little contact with Ms. Buck. Indeed, Ms. Buck testified that she had no idea that Ms. Mulally wanted Mr. Staub fired. 560 F.3d at 655. Mr. Korenchuk had greater contact, but in the one pre-termination meeting at which Mr. Korenchuk and Ms. Buck were present, there appears to have been no discussion between the two. *Id.* at 654. Therefore, all we know from this case is that Ms. Mulally and Mr. Korenchuk issued Mr. Staub the January 2004 warning, which eventually made its way to Ms. Staub's desk without advocacy. *Id.* at 655.

NFIB's approach yields results similar to those reached by the circuit courts, but it does so in a way that is faithful both to the intent requirement of the anti-discrimination laws and the Court's holding in *Reeves*. The factors NFIB highlights as important for consideration in subordinate bias cases are the same factors that implicitly led the circuit courts to their decisions. An analysis of independent decision-making, with a focus on the titular decisionmaker, will determine who the decisionmakers were and, ultimately, whose animus may be imputed to the employer.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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September 7, 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 7 - 2010
OFFICE OF THE CLERK

No. 09-400

IN THE
SUPREME COURT OF THE UNITED STATES

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1940, the National School Boards Association (NSBA) is a not for profit organization representing state associations of school boards and their 14,500 member school districts across the United States. NSBA is dedicated to the improvement of public education and has long been involved in advocating for reasonable application of federal non-discrimination laws in a manner that recognizes the special concerns and operational realities of public school systems, collectively the largest public employer in the nation. NSBA submits this brief to support the Seventh Circuit's decision to the extent it places limitations on employer liability under federal anti-discrimination statutes for the bias of non-decisionmaking employees, but more importantly to emphasize some of the shortcomings of the decision in its failure to account for the legal requirements and governance realities that school districts, as public employers, face and to place some responsibility on plaintiffs to report discrimination before an adverse employment action is taken by an unbiased decisionmaker unaware of the discriminatory animus of a subordinate.

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[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case presents the strong possibility of serious unintended consequences for the nation's school districts if this Court renders a decision that fails to recognize and account for the particular legal requirements and governance realities that dictate school board operations.

Under many state statutes, school boards are the final decision-makers in employment decisions subject to the Uniformed Services Employment and Reemployment Right Act (USERRA) and other non-discrimination statutes. At the same time, school boards generally are not involved in the day-to-day operation of schools and necessarily rely on the recommendations of their administrators in rendering these personnel decisions. So while the Seventh Circuit's decision appropriately recognizes that employers should be held liable for non decision-maker animus in only very limited circumstances, its decision does not account for situations where reliance on a "single source of information" is reasonable in light of legally mandated governance and supervisory structures and the practical realities encountered by school districts as public employers.

Similarly, the Seventh Circuit correctly holds that where an employer has conducted its own investigation, it is not liable under federal anti-discrimination statutes for an employee's animus in supplying misinformation to the decision-maker. However, by itself this approach in essence requires an employer to investigate and reach an independent decision for every tangible employment action where a subordinate has supplied some information about

the subject employee—even absent any evidence of bias—or face potential liability. Such a universal investigation requirement not only fails to account for the realities faced by school boards but also is unsupported by USERRA itself or by this Court's holdings. Arguments that without such a sweeping requirement, employers may intentionally isolate final decision-makers to avoid responsibility for bias and that bias could be unearthed if employers tried harder are irrelevant in the school board context.

By acknowledging only independent investigations as the means for employers to avoid liability in "cat's paw" cases, the Seventh Circuit ignores, and perhaps undermines, the numerous safeguards school districts have already put into place to address discrimination early on. Where an employer exercises reasonable care to prevent and promptly correct discriminatory behavior and the plaintiff unreasonably fails to take advantage of these opportunities to avoid additional harm, the bias of a discriminatory employee without formal authority to take tangible employment actions should not be imputed to the employer. A plaintiff who skips the opportunity to raise concerns about discrimination before an adverse employment action is taken should not be rewarded with a cause of action for discrimination premised on the "cat's paw" theory of liability.

ARGUMENT

The Seventh Circuit's decision appropriately holds that the "cat's paw" theory of liability[2] does not

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[2] Petitioner argues that the Seventh Circuit's injection of the "cat's paw" liability theory into this case was improper because

automatically impute a non-decisionmaking subordinate's bias to an employer in every instance where that employee provides negative information about another employee precedent to an adverse employment action by the employer. *Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009). To prevent the "cat's paw theory from spiraling out of control," the Seventh Circuit adopts the view that liability attaches only when the biased subordinate exerts "singular influence" over the decisionmaker. Where the decision-maker conducts its own investigation into the facts, the employer is not liable. *Id.* at 656-57 (*citing Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908, 909 (7th Cir. 2007) (rejecting "cat's paw" liability in Title VII case)). While this view appropriately offers some protection for employers unaware of subordinate bias, it is flawed in several respects warranting either rejection of the "cat's paw" theory altogether or an expansion of the defenses available to employers when plaintiffs invoke a derivative theory of liability under USERRA or other federal anti-discrimination laws.

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it unfairly narrows the scope of employer liability under USERRA, which Petitioner asserts by its terms calls for a strict application of agency principles that would yield a different result here. But courts considering whether to hold employers responsible under federal anti-discrimination statutes have generally considered the "cat's paw" liability theory in part "to prevent employers from unfairly insulating themselves from the consequences of adverse employment actions that are in reality based upon the discriminatory motives of a subordinate employee." *Hill v. Lockheed Martin, Logistics Management*, 314 F.3d 657, 684 (4th Cir. 2003)(Traxler, J., dissenting).

I. This Court Should Reject the "Cat's Paw" Theory of Liability Altogether Because the Statutorily Mandated Roles and Responsibilities of School Boards and the Practical Realities of School District Operations Make It Unreasonable To Impute the Unsanctioned, Discriminatory Animus of Subordinates to School Boards.

The statutorily defined roles and responsibilities of school boards and the operational realities of public school systems create obstacles limiting the probability that school boards charged as actual decision-makers will discover the discriminatory animus of subordinates who inform the board's employment decisions. These obstacles make it unreasonable to impose "cat's paw" liability on school boards absent an independent investigation. Instead, a more reasonable approach and one more likely to uncover bias is to require school employees to come forward and inform the school board about the discriminatory bias of subordinates and to provide incentives in the law to do so as discussed in Section III.

School boards are responsible for governing school districts and do so mostly through policy-making, not direct involvement in the daily operation of schools.[3] In most jurisdictions, school boards intersect with employment decisions in two primary ways. First, school boards promulgate rules and policies setting the terms of employment and

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[3] BECOMING A BETTER BOARD MEMBER at 7 (NSBA, 2006). ("A major function of any school board is to develop and adopt policies that spell out how the school district will operate.").

governing employee behavior, including discipline.[4] Second, by virtue of state law, in most states school boards are the actual decision-makers in employment matters, including hiring and firing employees.[5]

School boards do not directly manage and supervise employees.[6] These administrative functions are delegated primarily to

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[4] *Id.* at 8. ("The board is responsible for establishing policy governing salaries and salary schedules, terms and conditions of employment, fringe benefits, leave, and in-service training.").

[5] *Id.* at 170. ("In most states, the school board is the ultimate employer of all district employees—a fact that carries the appropriate legal baggage of responsibility and accountability."). *See, e.g.*, WIS. STAT. § 118.22(2) (2008) ("No teacher may be employed or dismissed except by a majority vote of the full membership of the board."); VA. CODE ANN. § 22.1-315 (2010) ("Nothing in this section shall be construed to limit the authority of a school board to dismiss or place on probation a teacher or school employee. . ."); LA. REV. STAT. ANN. § 42:1165A (2008) ("All job actions based upon the causes for disciplining or dismissal of teachers or other public school employees . . . shall remain under the exclusive jurisdiction of the appropriate parish or city school board."); MO. ANN. STAT. § 174.090 (West 2006) ("[No] teacher [may be] employed or dismissed, unless a majority of all the members of the board vote for the same."); CONN. GEN. STAT. ANN. § 10-220(a)(3) (2010) ("Each local or regional board of education ... shall employ and dismiss the teachers of the schools of such district. . ."); KY. REV. STAT. ANN. § 164.340 (West 2009) ("[N]o teacher [may be] employed or dismissed, unless a majority of all the members of the board vote for it.").

[6] BECOMING A BETTER BOARD MEMBER at 8. ("Unless otherwise specified in state statutes or board policy, a board exercises daily supervision and control primarily through its chief administrator and does not directly deal with staff members employed to assist the superintendent in implementing board directives.").

superintendents.[7] Typically the superintendent relies on assistant superintendents, area directors, principals, other supervisors and human resource employees to evaluate, supervise, train, and discipline district employees and recommend employees for hiring and termination. In fact, most school boards have no role in evaluating employees, investigating employee complaints, or developing recommendations for hiring, discipline, or termination.[8] Instead, school boards rely on input from administrators to inform their hiring and firing decisions. This operational structure is in no way designed to insulate the board from liability under federal anti-discrimination laws but rather is a separation of roles and responsibilities generally mandated by state law or dictated by logistical realities.

Where employees have no property or liberty interest in their employment,[9] or no statute or

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[7] *Id.* at 7. ("But although boards set policy, they do not carry it out. The responsibility for implementing policy is delegated to the superintendent of schools.").

[8] *Id.* at 174. ("Prudent boards set out policy guidelines for evaluating their employees, just as they do for evaluating the superintendent. Boards almost always delegate the actual evaluating to the superintendent, however, or to other members of the administrative or supervisory team.").

[9] School district employees have a property interest in their job by virtue of state law or a collective bargaining agreement granting them tenure or contract rights to continued employment. Teachers in most states have tenure rights after two or three years of employment. *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Updated for 1998 (1998), http://www.ecs.org/clearinghouse/14/41/1441.htm. About two-thirds of states have collective bargaining laws, many including all public employees. *See* Education Commission of the States,

collective bargaining agreement requires a hearing, school boards generally will rely only on the recommendations and the facts as presented by an administrator when deciding to terminate. Unless an issue of discrimination is raised by the affected employee, a school board generally will not look beyond the facts as presented. At that point the board is not in a position to identify *sua sponte* whether discriminatory bias played any part in the recommendation. In such instances, plaintiffs asserting a "cat's paw" theory of liability would no doubt point to these circumstances to show the administrator exerted "singular influence" on the board's decision. While in theory an independent investigation might reveal whether bias is contaminating the presentation of facts, for the reasons explained in Section II, such inquiries are neither feasible nor necessarily effective in every instance.

Under such circumstances, relying on the information and recommendation of a superintendent, even if doing so does not reveal discriminatory animus where it might exist, is reasonable. The school board is accustomed to relying on information from the superintendent to inform its policy- and decision-making functions[10] and has good reason to rely on a superintendent's recommendations in general. In most jurisdictions, the school board has carefully selected the

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State Collective Bargaining Policies for Teachers (2002), http://www.ecs.org/clearinghouse/37/48/3748.pdf.

[10] BECOMING A BETTER BOARD MEMBER at 129. ("Your superintendent should provide you the information you ask for when it is available. If it is not easily available, your superintendent should explain what effort is required to obtain it.").

superintendent as its top administrator and requires him or her to know and to act in accordance with all district policies, including its anti-discrimination policies.[11] More specifically, the school board has good reason to rely on a superintendent's recommendations regarding employment matters. The superintendent, either through direct supervision or contact with the employee's direct supervisor, is in a far better position than the board to understand the facts supporting the recommended employment action and the credibility of the employees involved.

Where employee property interests are at stake, whether by virtue of state statute or a collective bargaining agreement, school boards ostensibly have the opportunity to determine whether discriminatory bias was a factor in a subordinate employee's recommendation because school boards are required to hold hearings. In a hearing to contest an adverse employment action, an employee can raise issues of discrimination and has a full and fair opportunity to have those claims impartially considered and resolved, thus rendering it unnecessary to impute any discriminatory intent of subordinates to the actual decision-maker. Even so, a number of courts,[12] including the Seventh

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[11] *Id.* at 135. ("Selecting a new superintendent is perhaps the most important decision your board will ever make."). Where elected, the superintendent is generally charged by law "to advise and counsel with the district school board on all educational matters and recommend to the district school board for action such matters as should be acted upon. *See, e.g.*, FLA. STAT. § 1001.49(2) *et seq.* (2010).

[12] In an unpublished opinion, the Fourth Circuit also applied "cat's paw" reasoning to a school board regardless of the fact it held a hearing. In *Kozlowski v. Hampton Sch. Bd.*, No. 02-

Circuit, have concluded school boards may be a "cat's paw," despite providing the aggrieved employee an opportunity to present evidence, to raise issues, and to be fully heard. Imputing liability even after the employee has been provided this opportunity casts doubt on the merits of the "cat's paw" theory as a reasonable basis of employer liability.

In *Mateu-Anderegg v. School District of Whitefish Bay*, 304 F.3d 618, 622-624 (7th Cir. 2002), the plaintiff declined the opportunity for a statutory non-renewal hearing, yet the Seventh Circuit still concluded that the principal's alleged bias was attributable to the school board. Similarly, in *Kramer v. Logan County School District*, 157 F.3d 620, 624 (8th Cir. 1998), although the teacher participated in a five-hour hearing before the board, neither she nor her attorney ever uttered a word about discrimination, the two-judge majority nonetheless affirmed a $125,000 judgment in her favor. While the Eighth Circuit found it "troubling" that the teacher was silent about discrimination at the hearing, the court decided it was a jury question whether the school board had "accurately assessed" the teacher's situation. *Id.* at 624.

It is troubling that any court would allow a "cat's paw" liability claim to go forward where the

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1485, 77 Fed.Appx. 133 (4th Cir. 2003), a non-renewed head football coach, represented by counsel, failed to mention at his non-renewal hearing before the board that the principal recommending the non-renewal allegedly stated he wanted a younger coach. Despite this, the appeals court ratified the trial court's instruction that the board's liability rested solely on the motivation of the principal, in effect, that the school board was the "cat's-paw" of the principal, and ruled certain other evidence presented at the board hearing should have been excluded from the trial. 77 Fed.Appx. at 150-51.

employer offered the opportunity for a full scale hearing. It is also surprising that where school districts have held hearings—recognized in most jurisdictions as a thorough form of fact-finding—that such hearings have failed to adduce evidence of discriminatory bias on the part of informing subordinates.[13] This illustrates that some employees will not reveal evidence of discriminatory bias by subordinates no matter what the employer does to uncover such information, unless, perhaps, the employee has some incentive to do so.

II. Requiring School Boards To Investigate Discriminatory Animus on the Part of Informing Subordinates As the Only Means To Avoid Liability Is Unsupported by USERRA and Other Precedent and Imposes Unproductive and Counterproductive Burdens on School Boards.

According to the Seventh Circuit, an employer can avoid liability for a subordinate's discriminatory animus by investigating the facts relevant to the decision. *Staub*, 560 F.3d at 656 (citation omitted). While *Amicus* agrees that employers that conduct independent investigations before taking adverse employment actions should not be held liable under USERRA or other federal anti-discrimination statutes for subordinate bias, the Seventh Circuit's reliance on investigations as the sole means to

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[13] *See also Qamhiyah v. Iowa State Univ. of Sci. and Tech.*, 266 F.3d 733, 743 (8th Cir. 2009); *Tucker v. Talladega City Schs.*, 171 Fed.Appx. 289, 297 (11th Cir. 2006); *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 720 (8th Cir. 1998).

absolve employers from liability in such circumstances is supported by neither law nor policy.

There is no investigation requirement under USERRA or any of the other federal employment discrimination statutes where the "cat's paw" theory has been applied. In addition, other policy considerations weigh against it. First, imposing such a requirement would impose undue burdens on employers. Because every employee belongs to at least two protected classes (race and sex), under the Seventh Circuit's rationale, an investigation would be mandatory for every adverse employment decision based on subordinate input. Second, the scope of investigations sufficient to relieve employers of liability remains unclear under current law. Unless this Court crafted a clear and easily applied investigation standard, frequent litigation would arise over whether a proper investigation was performed. Finally, investigations aimed at finding discrimination are likely to be unproductive or even counterproductive.

A. Neither the plain language of USERRA nor prior Supreme Court precedent supports imposing an investigation requirement on employers.

Requiring employers to investigate all adverse employment actions in which a subordinate has provided input to make sure they comply with federal employment discrimination statutes would be a dramatic change for employers. This requirement has no grounding in the plain language of USERRA or any other federal employment discrimination statute. In fact, the failure to

investigate, in and of itself, is not an act of discrimination. *See Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290 (7th Cir. 1999) (failure to investigate harassment complaint was not evidence of pretext in a Title VII claim where employee never told his employer that alleged harassment was race-related); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (finding no sex discrimination for failing to investigate alleged sexual harassment where none of plaintiff's complaints concerned sexual harassment).

In other employment contexts, this Court has carefully limited the outer contours of the employer's duty to investigate; an employer must determine whether a violation of law has occurred only when the employer has *some prior reason to suspect possible misconduct*. In *Waters v. Churchill*, 511 U.S. 661, 677 (1994), a plurality of this Court, considering the First Amendment free speech claim of a terminated employee, determined that an employer is obligated to investigate if the supervisor knows "that there is a substantial likelihood that what was actually said was protected [speech]." Similarly, in *Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998), this Court recognized employers can avoid liability under Title VII of the Civil Rights Act of 1964 (Title VII) for the sexual harassment of supervisors where no tangible employment action was taken by receiving and responding to complaints of sexual harassment.

Under both *Waters* and *Ellerth*, no investigation is required until some specific allegation is made that an employee's legal rights are at stake. The purpose of the employer's inquiry is to determine whether a federal law has been

violated. The Seventh Circuit's decision departs from this focused approach. Rather than require an investigation only in those instances in which there is a reasonable concern about potential discrimination, it requires the actual decision-maker, in an effort to avoid liability, to conduct an investigation even if there is no hint of discriminatory animus in the conduct of the subordinate supervisor. This is a flawed analysis, because the failure to conduct an investigation is not, in and of itself, an act of discrimination.

Lower courts that have adopted an investigation requirement in "cat's paw" cases have reasoned that absent such a universal requirement, employers "might seek to evade liability, even in the face of rampant . . . discrimination among subordinates, through willful blindness." *EEOC v. BCI Coca-Cola*, 450 F.3d 476, 486 (10th Cir. 2006). But the Seventh Circuit's proposed solution to this potential problem sweeps too broadly. The solution is not to cast a wide net and require employers to presume bias and conduct investigations whenever information to support an adverse action comes from a subordinate. Rather, a more reasonable approach would be to permit a defense that promotes the purposes of anti-discrimination legislation without placing an onerous burden on either employers or employees.

Under the *Ellerth/Faragher* prevention defense, if the employee being terminated or disciplined believes that the subordinate supervisor is biased but fails to share this information with the actual decision-maker either informally or through an existing grievance or appeal process, then the employer is not liable. Employers could be held accountable if they fail to address on a case-by-case

basis any allegations of discrimination brought to their attention.[14] For the reasons explained in Section III, *Amicus* urges this Court, if it chooses to affirm the viability of the "cat's paw" theory of liability, to provide employers this affirmative defense.

B. Requiring a school board to investigate before every adverse employment action is excessively burdensome and duplicative of other steps school boards have taken to eliminate discrimination.

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[14] Courts have limited this accountability inquiry to determining whether the employer engaged in intentional discrimination in failing to investigate the allegations and not in second guessing the employer's reasonable business judgments. "[T]he court is not a 'super-personnel department' intervening whenever an employee feels he is being treated unjustly." *Cardoso v. Robert Bosch Corp.*, 427 F.3d 429, 435 (7th Cir. 2005). *See also Riser v. Target Corp.*, 458 F.3d 817, 821 (8th Cir. 2006) (explaining that federal employment laws "have not vested in federal courts authority to sit as super-personnel departments reviewing wisdom or fairness of business judgments made by employers, except to extent that those judgments involve intentional discrimination")(citation omitted); *Young v. Dillon Co.*, 468 F.3d 1243, 1250 (10th Cir. 2006) (stating that purpose of pretext analysis is "to prevent intentional discriminatory hiring practices," not to enable judges to "act as a 'super personnel department' second guessing employers' honestly held (even if erroneous) business judgments") (citation omitted); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 626 (6th Cir. 2006) (law "does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with") (citation omitted). This Court expressed a similar sentiment in *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies").

A mandatory investigation requirement before every adverse employment action would be particularly burdensome on school districts. It will force school administrators to engage in defensive employment practices that increase employer costs, either through the hiring of additional human resources staff and investigators or through the adoption and implementation of even more rigorous grievance and appeal policies that consume countless hours of time searching for a discriminatory motive where there is neither "smoke nor fire."[15]

School systems also would be subjected to more unworkable burdens because federal anti-discrimination statutes protect employees against other employment actions besides termination.[16] A requirement that boards investigate all recommendations to *hire* a particular individual over all the other applicants would be particularly onerous.[17] In a typical school district, administrators

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[15] Employers make countless decisions every day that do not involve discrimination. In 2009 the EEOC received 93,277 charges of discrimination; 60.9% of these were found to lack reasonable cause (ADA claims--59.5%; ADEA claims—63.6%; Title VII claims—61.3%). *See* EEOC Enforcement Statistics, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm. In 2008, the Department of Labor opened 1,389 new USERRA cases; 31% were dismissed for "no merit." *See* USERRA Fiscal Year 2008 Report to Congress, http://www.dol.gov/vets/programs/userra/main.htm.

[16] USERRA, 38 U.S.C. § 4311(a).

[17] *See, e.g., Natay v. Murray Sch. Dist*, 119 Fed.Appx. 289, 261 (10th Cir. 2005) (employee alleged superintendent's decision to not promote her was based on negative reports from principal who was allegedly racially biased); *Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002) (employee claimed she was passed over for promotion because of discriminatory animus of non-decision-

solicit applicants, select candidates to interview, conduct interviews, and recommend hiring particular candidates to the board, which has ultimate authority to make the hiring decision. If this Court adopts the Seventh Circuit's holding, a school board would be obligated to investigate the facts surrounding a subordinate's recommendation to hire (or not hire) each employee (and prospective employee).

If the school board, as the actual decision-maker, is required to reach behind the facts presented to ascertain everyone's version of the story or whether there are extant indicia of discrimination for every adverse employment action it considers, the board's entire function may be subsumed by time-consuming and ultimately unnecessary investigations. The board's ability to handle efficiently even the most routine employment decisions, let alone its other governance functions, would be severely hampered.

As part of their governance function, school boards take affirmative steps to ensure that subordinates recommending adverse employment actions do not act based on discriminatory animus and are satisfied that their recommendations are justified pursuant to state and federal law and school board policy. These steps include careful screening of administrator candidates, non-discrimination employment policies, employee training, internal complaint procedures, and the accessibility of the school board to receive complaints at school board meetings. If school boards must ignore administrator recommendations and conduct

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maker); *Barbano v. Madison County*, 922 F.2d 139, 143 (2d Cir. 1990) (finding that board's hiring decision relied on discriminatory recommendation from hiring committee).

their own investigations, particularly when hiring employees, the untenable result will be to shift the administrative personnel role to the school board itself.[18]

C. Unless this Court crafts a precise investigation standard, much litigation will ensue over whether an investigation was done correctly.

Without a clear investigation standard, "cat's paw" litigation will ensue in the federal circuits over whether the investigation was thorough enough, whether it sought the correct information using the correct methodology, whether the right conclusions were drawn from the information received, etc. Although Petitioner asserts that the Seventh Circuit's investigation standard would absolve the employer of liability if the final decision-maker were merely to give a cursory review of the subject employee's personnel file, it is far from clear that this would be the standard. Extensive discussions in the decision below and other subordinate liability cases of how the decision-maker responded after

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[18] Where state law delineates powers of the school board and administrators, a ruling to this end would throw statutorily established roles into disarray. In Illinois, for example, state statute specifically awards school boards the power to make employment decisions with respect to many types of employees. 105 ILCS 5/10-21.1; 105 ILCS 5/10-22.4; 105 ILCS 5/10-23.5; 105 ILCS 5/10-22.23; 105 ILCS 5/10-22.23a; 105 ILCS 5/10-22.24a; 105 ILCS 5/10-23.8a and 10-23.8b; and 105 ILCS 5/24-12. School boards must consider the superintendent's recommendations concerning selection, retention, and dismissal of employees. 105 ILCS 5/10-16.7.

receiving the allegedly biased recommendation belie the validity of this contention.

In addition, lower courts have been unable to craft a precise and uniform investigation standard. In fact, the lower courts that have concluded employers can escape "cat's paw" liability by doing investigations do not agree on what makes for a proper investigation.[19] For example, the Seventh Circuit in *Staub* and the Tenth Circuit in *BCI* both purport to adopt an investigation standard. However, it is unclear the investigation in *Staub*, which was acceptable to the Seventh Circuit, would have necessarily satisfied the Tenth Circuit because the actual decision maker did not ask Staub for his version of the events prior to making her termination decision. *See BCI*, 450 F.3d at 488 ("simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory"). The Eighth Circuit takes a far different approach than either the Seventh or Tenth Circuits and invites the jury to decide the merits of employer investigations—*no matter how thorough*. *See Kramer*, 157 F.3d at 624. Finally, conflicts exist as to whether investigations

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[19] *See, e.g.*, Stephen F. Befort & Alison L. Olig, *Within Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Anti-discrimination Statutes*, 60 S.C. L. REV. 383, 413-14 (2008); Sara Eber, *How Much Power Should Be in the Paw? Independent Investigations and the Cat's Paw Doctrine*, 40 LOY. U. CHI. L.J. 141, 190 (2008); Rachel Santoro, *Narrowing the Cat's Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 835 (2009); Curtis J. Thomas, *Cat's in the Cradle: Tenth Circuit Provides Silver Spoon of Subordinate Bias Liability in EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 61 OKLA. L. REV. 629, 644 (2008).

actually overcome the "cat's paw" theory of liability. For example, in *Mateu-Anderegg* the Seventh Circuit appears to reject the school board's investigation conducted at a lengthy hearing as a sufficient means of cutting off the board's status as a "cat's paw." 304 F.3d at 624. Thus, a passing acknowledgment of an investigation defense without more clarification from this Court would surely increase litigation in the federal courts.

D. Requiring a school board to investigate possible discriminatory animus whenever a subordinate has recommended an adverse employment action would unduly burden employers and may be unproductive and even counterproductive.

Under the "cat's paw" theory the employer is liable because the discriminatory subordinate uses his or her influence in effect to make the employment decision without giving the actual decision-maker all the relevant facts. The subordinate may not be telling the truth about what happened—or may be making a recommendation that he or she would not make but for discriminatory bias.

Unfortunately, investigations aimed at uncovering animus are unlikely to be productive. Biased subordinates intent on misleading the decision-maker are unlikely to reveal their bias even when asked directly about it, which is why some courts do not count a meeting with the biased

subordinate as an independent investigation.[20] It is also questionable whether employees facing an adverse employment action and other relevant witnesses would necessarily reveal discriminatory bias of informing when asked directly about it, especially if they were not willing to bring it up themselves beforehand. In fact, there would be no "cat's paw" cases at all if employees were willing to come forward and reveal the bias of the subordinate to the actual decision-maker, unless the actual decision-maker turned a deaf ear to the complaint.

Investigating for discriminatory bias in every employment decision may even be counter-productive, because it may discourage employees from becoming whistleblowers, knowing that reporting another employee's behavior could result in an inquiry into their own potential discriminatory motives for disclosing information that may play a factor in an employment decision. Such reticence can have disastrous consequences in a school setting where administrators often discover employee misconduct, such as inappropriate sexual relationships between employees and students, through other employees reporting their suspicions.[21] Such a rule would particularly burden

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[20] *See, e.g.*, *Brewer*, 479 F.3d at 918 ("It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source."); *BCI Coca-Cola*, 450 F.3d at 488 (finding independent investigation exists when "the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated")

[21] *See, e.g.*, *P.H. v. School Dist. of Kansas City*, 265 F.3d 653 (8th Cir. 2001) (other teachers complained to administration

school boards that frequently rely on a subordinate for information before taking adverse employment actions. Screening every employment action for discriminatory bias would likely require innumerable hearings with inquiries regarding the bias of all informing subordinates before making any decision. Even where state law, collective bargaining agreements, or constitutional provisions already require a hearing before employee terminations, the focus of the hearings would shift from determining whether just cause for the termination exists to searching for the potential, if not evanescent, discriminatory animus of the employee informing the board's decision. The administrator recommending the adverse action would have to simultaneously prosecute the case and mount a defense to his or her motivations. In summary, the employer's burden in chasing this fleeting dragon in the sky would be inordinate, unreasonable, unnecessary and would discourage administrators from taking some adverse employment actions altogether.

Finally, investigating for discriminatory animus in all instances, especially where the actual decision-maker has no reason to believe it exists, may only serve to encourage employees on the brink of termination to manufacture claims of bias to avoid termination. A number of the "cat's paw" cases

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that teacher was spending too much time with student); *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57 (D. Me. 1999) (substitute teacher reported to administration that she saw male teacher dance in sexually suggestive manner with several boys); *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001) (school librarian reported to principal that she saw student sitting on teacher's lap in inappropriate manner).

decided by the lower courts were brought based on scant evidence of discrimination. *See, e.g., Rose v. New York City Bd. of Educ.*, 257 F.3d 156 (2d Cir. 2001) (age discrimination claim based on supervisor allegedly telling plaintiff twice she could be replaced by someone "younger" and "cheaper"); *Schreiner v. Caterpillar, Inc.*, 250 F.3d 1096 (7th Cir. 2001) (sex discrimination case based on supervisor's statement during investigation that the female plaintiff's position is "not a woman's area," where the supervisor immediately approved both of plaintiff's requests for a pay increase upon being informed of them). At the very least, such cases illustrate that it would take little effort for a disgruntled employee to misconstrue an innocuous statement or simply to manufacture a discriminatory statement in an attempt to avoid termination.

III. If This Court Adopts the "Cat's Paw" Theory of Liability, It Should Provide School Boards with a Workable Affirmative Defense

This Court should reject the "cat's paw" theory of subordinate bias liability for the reasons discussed above. However, if this Court adopts the "cat's paw" theory, it should provide employers an affirmative defense similar to that provided in *Ellerth*, 524 U.S. 742 and *Faragher v. City Boca Raton*, 524 U.S. 775, 778 (1998), instead of making an independent investigation the only means for an employer to avoid liability.[22] Employers should be able to avoid

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[22] *Amicus* found no federal circuit courts opinions permitting employers to avoid "cat's paw" liability by relying on the *Ellerth/Faragher* defense. At least one law review article

"cat's paw" liability where the employer exercised reasonable care to prevent and promptly correct any discriminatory behavior; and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. This Court should adopt this "prevention defense" for the following reasons: (1) in "cat's paw" cases the power of the agency relationship to aid discrimination is weakened; (2) the defense is consistent with statutory goals of deterring discrimination; (3) the most practical way to uncover subordinate bias is requiring employees to come forward; and (4) complaints of bias are protected by statutory retaliation provisions.

A. In cat's paw cases the power of the agency relationship to aid discrimination is sufficiently weakened to such a degree that an affirmative prevention defense is appropriate.

Petitioner argues that Proctor Hospital should be vicariously liable for the discriminatory animus of Korenchuk under agency principles because he acted in the scope of his employment by engaging in a number of "employment-related responsibilities"[23] that led to Staub's termination. This argument overlooks the long accepted principle recognized by this Court in *Ellerth/Faragher* that a supervisor engaging in discrimination is generally not

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promotes this affirmative defense, after discussing the disadvantages of requiring employers to engage in investigations to avoid liability. *See* Befort, *supra*, note 19.

[23] Petitioners Br. at 30.

considered to be acting within the scope of employment,[24] counseling against a "mechanical application" of agency principles. In those cases, the Court recognized that misuse of supervisory authority alone does not always place the actions clearly within the scope of employment for purposes of determining employer liability.[25]

In *Ellerth/Faragher* this Court considered when employers would be liable for the uncondoned discriminatory actions of supervisors outside the scope of employment. Further analyzing agency principles, the Court concluded that where supervisors take a "tangible employment action," there is a clear indication that the agency relationship, whatever its "exact contours," aids the supervisor in the commission of an unlawful employment action, thereby foreclosing any affirmative defense by the employer. But where supervisors take no tangible employment action, the Court found they are not "obviously" aided by the agency relationship. *Ellerth*, 524 U.S. at 763. Employers can thus avoid liability if they are able to meet the requirements of an affirmative defense. In short, when a supervisor is acting outside of the scope of his or her employment, a supervisor's direct ability to impose harm through a tangible employment action is what makes the agency relationship clear and what forecloses an affirmative defense to the employer. While the United States asserts that it is enough for a supervisor's actions to

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[24] *Ellerth*, 524 U.S. at 744"As Courts of Appeals have recognized, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer."

[25] *Faragher*, 524 U.S. 775, 801.

"result" in a tangible employment action,[26] this argument ignores the frequent references in *Ellerth* to the supervisor actually taking the action himself or herself.[27]

In a "cat's paw" case *there is a tangible employment action, but it has not been taken by a biased supervisor but instead by an unwitting actual decision-maker.* Indeed in "cat's paw" cases the biased supervisor lacks authority to take tangible employment actions and must purposely mislead or deceive the decision-maker to achieve his or her desired end. Except perhaps where the decision-maker routinely "rubber stamps" or engages in only a brief or perfunctory review,[28] the agency relationship as a basis for liability is more

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[26] Brief of United States at 16.

[27] "For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate." *Ellerth*, 524 U.S. at 763-64. "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Id.* at 769 (Thomas, J., dissenting). In discussing tangible employment actions, the Court does cite *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), a "cat's paw" case, noting that supervisors' tangible actions may sometimes be subject to review and that supervisors must sometimes obtain the "imprimatur of the enterprise." *Id.* at 762.

[28] *Cf. Shager*, 913 F.2d at 405 (looking to causation as linchpin in ADEA case to find employer liable for discriminatory animus of supervisor who recommended termination of older worker; court noted supervisor's recommendation may have been "decisive" because review committee performed only "brief" and "perfunctory" review that no committee member could recall).

attenuated than where the supervisor has direct authority to hire and fire, thus making an affirmative defense appropriate.

B. The *Ellerth/Faragher* defense promotes the deterrent purposes of federal non-discrimination statutes.

Unlike the approach the Petitioner advocates here—strict and unswerving application of agency principles—this Court has recognized that in discrimination cases, imposition of employer liability may sometimes turn on accommodating "equally basic" statutory goals such as promoting the adoption of anti-harassment policies by employers and encouraging employees to report harassing conduct before it escalates.[29] Two of the purposes of USERRA are "to encourage noncareer service in the uniformed services by eliminating and minimizing the disadvantages to civilian careers and employment which can result from such service"[30] and "to prohibit discrimination against persons because of their service in the uniformed services."[31] Similarly, the primary purpose of other federal employment statutes, including Title VII, is to prevent discrimination.[32] *See Faragher*, 524 U.S. at

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[29] *Faragher*, 524 U.S. at 807.

[30] USERRA, 38 U.S.C. § 4301 (a)(1) (2006).

[31] *Id.* at § 4301(a)(3).

[32] When determining subordinate bias claims, lower courts have applied the same legal principles to Title VII, ADEA, and ADA cases. *See Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004), (noting Title VII and ADEA define "employer" the same); *Russell v. McKinney*, 235 F.3d 219 (5th Cir. 2000) (ADEA case); *Iduoze v. McDonald's Corp.*, 268 F.Supp.2d 1370 (N.D. Ga. 2003) (ADA case). Lower courts will

805-06 ("Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' [citations omitted], its 'primary objective' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.").

By adopting a similar affirmative defense in "cat's paw" cases, this Court will further the statutes' deterrent purpose by encouraging 1)employers to create and enforce policies prohibiting discrimination; 2)employees to come forward early with discrimination complaints; and 3)employers to investigate and resolve complaints. Upon receiving a complaint of subordinate bias, an *Ellerth/Faragher* prevention defense would encourage employers to do an investigation *when it makes sense to do so*, instead of requiring an investigation before taking *any* adverse employment action based on input from subordinates. Ideally, the *Ellerth/Faragher* defense will help prevent actual decision-makers who have been informed by biased subordinates from taking tainted adverse employment actions.[33] Even if the employer erroneously concludes after receiving and investigating an employee's complaint of subordinate bias that no such bias existed and is subsequently successfully sued, at least the employer is not blind-sided by the subsequent discrimination lawsuit.

An employee who skips an opportunity to raise concerns about discrimination before an

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likely apply the Court's ruling here to "cat's paw" suits brought under these other employment statutes.

[33] *Cf. Shager*, 913 F.2d at 405 (noting that review committee accepted biased supervisor's information as plausible, in part because it was not "conversant with the possible age animus that may have motivated [the] recommendation").

adverse employment action is taken should not be rewarded with a federal cause of action for discrimination premised on the "cat's paw" theory of liability.[34] Yet this is exactly what happened in *Mateu Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, and may continue to happen if the Court adopts "cat's paw" liability without a suitable defense for employers. In both cases despite the availability of a full and fair hearing during which the plaintiffs could have raised concerns about discrimination but did not, the courts entertained "cat's paw" claims. Dissenting and concurring opinions in both cases appropriately suggest that offering employees a mechanism for complaining about the bias should be enough to avoid "cat's paw" liability.[35]

Most school boards have mechanisms in place to receive and respond to complaints of subordinate bias or other discrimination. Aside from formal hearings related to employment actions, school boards typically have complaint procedures for any

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[34] *See generally Faragher*, 524 U.S. at 806-07 ("If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so... If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care").

[35] *See Kramer*, 157 F.3d at 629 (Hansen, J., dissenting) (expressing concern that teacher had "sandbagged" school board by not revealing concerns about discrimination during a five-hour school board hearing and then "blindside[d]" the board with a subsequent Title VII lawsuit). *See Mateu-Anderegg*, 304 F.3d at 628 (Ripple, J., concurring) (stating school board did not rubber stamp principal's recommendation to non-renew a teacher where board planned to conduct independent inquiry into reasons for non-renewal but teacher declined to participate).

citizen, including employees, to use to raise concerns through the district's chain-of-command. A person raising a complaint who is not satisfied by working with administrators can ultimately raise the issue with the board.[36] Moreover, concerns about discriminatory actions also can be raised at regular board meetings where individuals, including employees, can address the board directly by asking to be placed on the agenda or speaking during the public comment period.[37]

Importantly, school boards, as public employers and recipients of federal funds, are bound by numerous federal and state non-discrimination mandates, including USERRA.[38] In compliance with these laws, virtually all school districts adopt non-

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[36] *See e.g.*, Montgomery County Public Schools, Responding to Inquiries and Complaints from the Public, http://www.montgomeryschoolsmd.org/departments/policy/pdf/klara.pdf (last visited Aug. 23, 2010); Tulsa Public Schools, Public Concerns and Complaints, http://www.tulsaschools.org/district/bp/1302R.shtm (last visited Aug. 23, 2010).

[37] BECOMING A BETTER BOARD MEMBER at 44. ("Your board should have a policy on how citizens can request speaking time, when they can speak, how many citizens can speak, and how long they can speak.").

[38] Other federal non-discrimination laws applicable to school districts include: Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*; Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

discrimination policies,[39] develop complaint and administrative procedures specifically for employees,[40] and disseminate these policies and procedures through various means, including district policy manuals, employee handbooks, and in service training. These policies typically include procedures for reporting and investigating discrimination complaints to ensure the alleged misconduct is addressed and resolved at the earliest point possible.

In fact, many school board policies oblige all employees, including supervisors, to report discriminatory misconduct specifically to detect unlawful discrimination from the outset. For these processes to be most effective, employees must come forward and raise discrimination issues with their employer *before* filing a lawsuit. This Court should reaffirm the importance of encouraging employees to bring forward complaints of discrimination immediately, so as to prevent and remedy

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[39] BECOMING A BETTER BOARD MEMBER at 171 (noting typical hiring policy includes equal employment opportunity clause and nondiscrimination statement.). *See also* U.S. Department of Education, Office for Civil Rights, Notice of Non-Discrimination, http://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html (last visited July 19, 2010) (listing numerous anti-discrimination laws and requisite notices affecting school districts).

[40] BECOMING A BETTER BOARD MEMBER at 177 ("A grievance procedure should begin with an informal attempt to resolve the problem with the employee's immediate supervisor. If the initial step doesn't provide relief the complainant finds satisfactory, most grievance procedures allow for a written complaint and response at the same level. Then, subsequent appeals move along, step-by-step, up through the chain of command. Finally, if the employee still is not satisfied with the administrative response, a typical grievance procedure allows for further appeal in the form of a hearing before the superintendent, or in some cases, before the school board.").

discrimination; where the employer has indicated it is ready, willing, and able to receive and act on such complaints, an *Ellerth/Faragher* type defense should be available in "cat's paw" cases.[41]

C. Putting onus on the employee to come forward is the most practical way to actually uncover subordinate bias.

The *Ellerth/Faragher* prevention defense puts the burden on employees to come forward with complaints of subordinate bias, assuming the employer has procedures in place to receive and respond to such complaints. As discussed in Section II.D., it is neither realistic to investigate every employment decision that involves subordinate input nor to assume that a biased subordinate will confess even if asked directly in such an investigation. For these reasons, the onus of revealing subordinate bias is reasonably placed on the person who experienced it. The Seventh Circuit has acknowledged the practical importance of employees coming forward to put the employer on notice of subordinate bias. *See Brewer v. Board of Trustees of the University of Illinois*, 479 F.3d 908, 919 (7th Cir. 2007) ("No one suggested that [the plaintiff] was unable to bring [information that his supervisor was racist and told him to do what he was fired for doing] to [the actual decision-maker's] attention, and until [the plaintiff] did so [the actual decision-maker] had no reason to suspect that there were additional relevant facts

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[41] *Ellerth*, 524 U.S. at 764 ("To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.").

that she had not investigated."). In short, without the prevention defense, employees who do not step forward to disclose subordinate bias but instead allow it to progress in severity can still claim that the very same discrimination should be imputed to an employer unaware of the discrimination for purposes of determining liability for an adverse employment action.

D. Anti-retaliation provisions in federal employment anti-discrimination laws are intended to protect employees who report discrimination.

USERRA[42] and other federal anti-discrimination employment laws[43] protect employees from being retaliated against for reporting discrimination, including the bias of subordinates. These anti-retaliation provisions "prevent employers from misusing their authority in order to deter discrimination claims and inhibit the effectiveness of anti-discrimination provisions."[44] The employee's initial claims of discrimination need not even been true, just reasonable, because "a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful."[45] By providing anti-reprisal provisions,

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[42] 38 U.S.C. § 4311(c)(2).

[43] ADEA, 29 U.S.C. § 623(d); ADA, 42 U.S.C. § 12203(a); Title VII, 42 U.S.C. § 2000e-3(a).

[44] Nancy L. Caplinger & Diane S. Worth, *Vengeance is Not Mine: A Survey of the Law of Title VII Retaliation*, 73 APR. J. KAN. B.A. 20, 21 (2004).

[45] Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 555

the statutes "contemplate[] that employees will play a critical role in deterring discrimination."[46] Given this protection, it is reasonable to obligate employees to report subordinate bias under a prevention defense, so long as employers have procedures in place to receive and respond to complaints of discrimination.

While arguably some employees do not report discrimination because of fear of reprisal, the number of people taking advantage of anti-retaliation provisions in the past few years has greatly increased.[47] Many "cat's paw" plaintiffs have a long history of employment difficulties (caused by discrimination or otherwise) and at least suspect their continued employment is uncertain well before they are recommended for termination.[48] Employees who suspect that a discriminatory adverse employment action is imminent cannot plausibly claim they fear retaliation since they already believe their jobs are in jeopardy. At that point, they have

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(2003) *quoting* U.S. EEOC, EEOC Compliance Manual 6509 (Judith A. Tichenar et al. eds., 2001).

[46] Smith, *supra* note 43, at 530.

[47] Caplinger, *supra* note 42, at 35.

[48] *See, e.g.*, *Staub*, 560 F.3d at 654 (employee had history of frequent complaints made against him); *Brewer*, 479 F.3d at 910-12 (employee involved in multiple disputes with supervisor); *Mateu Anderegg*, 304 F.3d at 621-22 (principal met with teacher multiple times to discuss performance problems); *EEOC v. Liberal R II Sch. Dist.*, 314 F.3d 920, 921-22 (8th Cir. 2002)(history of animosity between employee and supervisor); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 158-59 (2d Cir. 2001) (employee cited by supervisor for various violations and received list of improvements to make to avoid termination).

little to lose and much to gain by reporting discrimination.[49]

CONCLUSION

For the foregoing reasons, *Amicus* requests this Court to affirm the Seventh Circuit's decision to the extent it places limitations on employer liability under federal anti-discrimination statutes for the bias of non-decision-making employees. *Amicus* respectfully urges the Court in making its decision to take into account the legal requirements and governance realities that school districts, as public employers, face and to place some responsibility on plaintiffs to report discrimination before an adverse employment action is taken by an unbiased decision-maker unaware of the discriminatory animus of a subordinate.

Respectfully submitted,

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September 7, 2010

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[49] Befort, *supra* note 19, at 421 ("Employees who are on the brink of discharge due to subordinate bias will not have that same fear, but instead will see the reporting procedure as the last chance to save their jobs.").

AMICUS CURIAE BRIEF

No. 09-400

Supreme Court, U.S.
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In The
Supreme Court of the United States

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTEREST OF *AMICUS CURIAE*

The Reserve Officers Association[1] of the United States (ROA) was founded in 1922 and chartered by Congress in 1950. ROA is composed of approximately 65,000 members: military officers, former officers, and spouses of all the uniformed services of the United States, primarily the National Guard and Reserve (NG&R). In accordance with the charter, ROA advocates the development and implementation of policies that will provide for adequate national defense, especially policies relevant to the NG&R.

With today's heavy reliance on the NG&R, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §4301 *et seq.*, plays a vital role in national security. Without a law like USERRA, the services would not be able to recruit and retain the necessary quality and quantity of personnel to defend our country.

In 1997, ROA established a "Law Review" column, published in its monthly magazine and at its website. More than 600 articles, approximately 500 regarding USERRA, and a detailed Subject Index can be found at www.roa.org/law_review. In 2009, ROA established the Service Members Law Center to

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[1] The parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

educate the bench and bar, NG&R members, employers, and others about USERRA, the Servicemembers Civil Relief Act, the Uniformed and Overseas Citizens Absentee Voting Act, and other laws that are particularly pertinent to those who serve our nation in uniform.

Given its purpose, membership, and history, ROA offers its unique perspective to assist this Court and to promote proper outcomes for future USERRA litigation.

SUMMARY OF ARGUMENT

In light of the history of veterans' reemployment rights, it is the view of ROA that application of "cat's paw theory" to USERRA discrimination claims conflicts with Congress' intent and the plain language of USERRA. If this is permitted to continue it will allow employers to escape liability for taking discriminatory actions against members of the U.S. military.

THE HISTORY OF THE VETERANS' REEMPLOYMENT RIGHTS STATUTE SUPPORTS A LIBERAL CONSTRUCTION FOR THE BENEFIT OF THOSE WHO SERVE OUR NATION IN UNIFORM

In 1940, after World War II (WWII) had begun, but before the United States entered the war, Congress enacted the Selective Training and Service

Act of 1940[2] (STSA), the law that provided for the induction of young men (eventually 10 million) for WWII. Senator Elbert Thomas of Utah conceived of the idea to require civilian employers of those drafted to reemploy them upon their release from service. He offered an amendment to that effect and persuaded his colleagues to support the amendment, which became §8 of the STSA.

Senator Thomas explained the rationale for his amendment as follows:

> [I]f Congress has the power to raise an army that power can be effectively exercised only if Congress can take such measures as are necessary to make it an efficient army and to prevent undue hardships upon the persons who constitute the army. . . . [N]o one can deny that if we guarantee [veterans] their jobs when their military service is completed we have taken a long step in providing the Army and Navy with patriotic men who are willing and anxious to serve their country. . . . [I]t is not unreasonable to require the employers of such men to rehire them upon completion of their service, since the lives and property of employers, as well as the

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[2] Pub. L. 76-783, 54 Stat. 885, 890. The reemployment statute had many different formal names, but it came to be known colloquially as the Veterans' Reemployment Rights Act (VRRA). In this brief, ROA will use VRRA to refer to the reemployment statute in effect prior to 1994, when Congress enacted USERRA as a long-overdue recodification of the VRRA.

> lives and property of everyone else in the United States are defended by such service.

96 Cong. Rec. 10573 (remarks of Sen. Thomas), quoted in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240, 246 (8th Cir. 1991).

As originally enacted in 1940, §8 of the STSA accorded reemployment rights only to those who were drafted. Section 7 of the Service Extension Act of 1941[3] amended the reemployment provision to accord persons who voluntarily enlisted in the armed forces after May 1, 1940 the same reemployment rights as draftees.[4] Beginning in the 1950s, Congress expanded the law to accord reemployment rights to persons who left civilian jobs for training or service in the NG&R. In 1955, §2(f) of the Reserve Forces Act of 1955[5] amended the VRRA to accord reemployment rights to persons who left civilian jobs to perform 3-6 months of initial active duty training (IADT) in the NG&R.

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[3] Pub. L. 77-213, 55 Stat. 626, 627.

[4] Although the VRRA applied to voluntary enlistees as well as draftees, this law remained part of the draft law until 1974. The draft law was called the Selective Training and Service Act of 1940. Congress changed the name to the Selective Service Act of 1948, Pub. L. 80-759, 62 Stat. 604. Three years later, Congress changed the name to the Universal Military Training and Service Act of 1951, Pub. L. 82-51, 65 Stat. 75. The final name for the draft law was the Military Selective Service Act of 1967, Pub. L. 90-40, 81 Stat. 100.

[5] Pub. L. 84-305, 69 Stat. 598, 602.

After successfully completing IADT, a member of the NG&R is generally required to perform inactive duty training (IDT), usually but not always on weekends, and active duty for training (ADT), usually for about two weeks once per year. In 1960, Congress amended the VRRA to accord reemployment rights to NG&R members returning to work after IDT and ADT.[6]

After the 1960 amendment, NG&R personnel had the right to absent themselves repeatedly from their civilian employment for periodic military training. Some employers perceived these repeated absences to be a nuisance, and some employers were tempted to rid themselves of the nuisance by firing or otherwise discriminating against NG&R members. Accordingly, in 1968, Congress made it unlawful for an employer to deny a service member retention in employment, promotion, or an incident or advantage of employment because of the employee's obligations as a member of a reserve component of the armed forces.[7] In 1986, Congress expanded that provision to outlaw discrimination in hiring as well.[8]

In 1974, Congress significantly changed the law. Section 9(c)(3) of the VRRA became §2021(b)(3). This

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[6] Pub. L. 86-632, 74 Stat. 467.

[7] Section 1 of Pub. L. 90-491, 82 Stat. 790.

[8] Section 331 of the Veterans' Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. 99-576, 100 Stat. 3248, 3279.

section is the precursor to §4311 of USERRA, the section that is relevant to the case at bar. That same year, Congress also disconnected the reemployment statute from the draft law, moving the reemployment statute from title 50, national defense, to title 38, veterans' benefits. These enactments became the Vietnam Era Veterans Readjustment Assistance Act[9] (VEVRAA), which also made other important and substantive changes to the reemployment statute, including making the law applicable to state and local governments for the first time.[10]

The Supreme Court has addressed the reemployment statute 16 times[11] and this case will be

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[9] Section 404 of the VEVRAA, Pub. L. 93-508, 88 Stat. 1578, 1594-1600.

[10] Section 2021(a)(2)(B) of the VRRA, as amended by VEVRAA, added States and their political subdivisions to the kinds of employers subject to this law. The reemployment statute has applied to the Federal Government and to private employers since 1940.

[11] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); *Trailmobile Corp. v. Whirls*, 331 U.S. 40 (1947); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949); *Oakley v. Louisville & Nashville Railroad Co.*, 338 U.S. 278 (1949); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Diehl v. Lehigh Valley Railroad Co.*, 348 U.S. 960 (1955); *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265 (1958); *Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169 (1964); *Brooks v. Missouri Pacific Railroad Co.*, 376 U.S. 182 (1964); *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225 (1966); *Eagar v. Magma Copper Co.*, 389 U.S. 323 (1967); *Foster v. Dravo Corp.*, 420 U.S. 92 (1975); *Alabama Power Co. v. Davis*,

(Continued on following page)

the 17th. Shortly after WWII ended, this Court interpreted the reemployment provision of the STSA for the first time. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946). The decision states a purpose for the Act:

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

Fishgold, 328 U.S. at 284.

The decision continues with the Court's mandate to construe the law in favor of the veteran: "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Id.*, at 285. The defined approach by this Court in *Fishgold* has caused it to serve as the seminal case for interpreting statutes involving veterans' benefits ever since. *See* Recent Decisions, *Veterans. Re-Employment under Selective Service Act. Protection of Seniority*, 33 VA. L.REV. 2, 219 (1947).

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431 U.S. 581 (1977); *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980); *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981); and *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991); *See also* Category 10.1 at www.roa.org/law_review for comprehensive notes on these cases.

During WWII, not unlike today, the United States was embroiled in a war on two fronts. More than 16 million men and women served in the U.S. armed forces during the war. When the Supreme Court decided the *Fishgold* case on May 6, 1946, millions of those U.S. service members had recently returned from war and were settling back into their civilian jobs and lives. Many of the awe-inspiring sounds and images that are now immortalized in our national conscience were fresh in the minds of Americans in 1946, especially the raising of the U.S. flag on Mount Suribachi on Iwo Jima.[12] Similarly, the words and images of today's generation are fresh in our minds, especially the horrors of September 11, 2001.

The Supreme Court's first 14 cases applying the VRRA involved persons who were drafted or who voluntarily enlisted in the regular armed forces, but the last two cases (1981 and 1991) have dealt with the application of this law to NG&R members. This is not surprising. After Congress abolished the draft in 1973, the Department of Defense adopted its "Total Force Policy" and greatly increased reliance upon NG&R personnel.

In *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981), the Court addressed the situation of Roger D. Monroe, a junior enlisted member of the Ohio Army National Guard. Mr. Monroe worked for the Standard

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[12] February 23, 1945, by photographer Joe Rosenthal.

Oil Co. at its refinery in Lima, Ohio. The refinery operated 24 hours per day, 365 days per year. Mr. Monroe and his colleagues worked five consecutive eight-hour days per week, but not always Monday through Friday. The burden of working weekends was distributed among the employees.

As a member of the National Guard, Mr. Monroe was required to participate in one weekend of IDT (drills) each month, and his drill weekend frequently conflicted with his scheduled work at the refinery. When this occurred, Standard Oil complied with the VRRA and granted him an unpaid military leave of absence for the days when his military training obligation prevented him from working at the refinery.

Monroe's complaint was that showing up for his required National Guard training cost him money. Because he was junior in the Army National Guard, his Army pay for a weekend of training was substantially less than what he could earn for working Saturday and/or Sunday at the refinery. Monroe's National Guard training weekend was generally the same weekend each month, and he had provided his employer with a list of the training dates for the whole fiscal year.

Monroe contended that §2021(b)(3) of the VRRA required the employer to schedule his refinery work around his drill weekends. Monroe asked the employer to schedule his civilian work around his anticipated military training obligations. When the

employer refused to make this accommodation, Monroe sued and prevailed in the United States District Court for the Northern District of Ohio.[13] Standard Oil appealed and prevailed in the Court of Appeals.[14]

The Supreme Court granted *certiorari* because of an apparent conflict among the Circuit Courts.[15] In a 5-4 decision written by Justice Potter Stewart, the Court affirmed the Sixth Circuit's dismissal of Monroe's claim. After reviewing the legislative history of §2021(b)(3), the Court held: "The legislative history thus indicates that section 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-Reservist against discriminations like discharge and demotion, motivated *solely* by Reserve status." *Monroe*, 452 U.S. at 559 (emphasis supplied). The Supreme Court did not hold that an employee challenging a discharge under §2021(b)(3) would be required to prove that he or she was fired *solely* because of NG&R obligations.

In fact, that interpretation of *Monroe* was not only *dictum* but was taken out of context. Nonetheless, the Tenth Circuit relied on this out-of-context *dictum* in reversing a District Court decision for a

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[13] *Monroe v. Standard Oil Co.*, 446 F. Supp. 616 (N.D. Ohio 1978).

[14] *Monroe v. Standard Oil Co.*, 613 F.2d 641 (6th Cir. 1980).

[15] The Court referred to *West v. Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980).

Naval Reservist who had been fired. *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988). In *Sawyer*, the District Court had found that the reservist had established that his reserve obligations constituted at least one of the reasons for the firing, and that the firing was unlawful. However, the Tenth Circuit held that the reservist was required to prove that his reserve obligations constituted *the sole reason* for the firing.

A statute that requires the fired employee to prove that he or she was fired *solely* because of military obligations is of little value. As is explained more fully below, Congress forcefully dealt with the *Sawyer* problem when it enacted USERRA in 1994.

After *Monroe*, a decade passed before the last (until now) Supreme Court case on the reemployment statute, *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991). William "Sky" King was a senior enlisted member of the Alabama Army National Guard. The National Guard selected him for the position of Sergeant Major of the Alabama National Guard, a position that would require him to serve full-time for three years as the senior enlisted advisor to the Adjutant General of Alabama. King informed his civilian employer that he would be leaving his job for approximately three years of full-time military service. The employer strenuously objected to the duration and contended that King would not have the right to reemployment upon completion of such a lengthy period of service. King informed the employer that he would be reporting for full-time military

service as ordered and that the question of his reemployment rights could be resolved upon his return from service. The employer was unwilling to wait and filed suit against King in the United States District Court for the Northern District of Alabama, seeking a declaratory judgment to the effect that King would not have reemployment rights upon his completion of service.[16] In an unreported decision, the District Court granted the declaratory judgment requested by St. Vincent's Hospital, and the Eleventh Circuit affirmed.[17]

The VRRA had a four-year limit on the duration of *active duty*, but no limit on the duration of *active duty for training* (ADT). The typical ADT period is approximately two weeks, but starting in the 1970s the services started asking some of their NG&R members to participate in substantially longer ADT periods or more than one ADT period per year.

In 1981, the Fifth Circuit decided that a Reserve Component member did not have the right to unpaid military leave under the VRRA for a lengthy training period that the court found to be unreasonably burdensome on the employer. *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981). Later, the Third Circuit

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[16] Section 4323(f) of USERRA, 38 U.S.C. §4323(f), specifically precludes such employer-initiated lawsuits under the new law.

[17] *St. Vincent's Hospital v. King*, 901 F.2d 1068 (11th Cir. 1990).

agreed with this judicially created "rule of reason" under the VRRA. *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688, 694 (3rd Cir. 1989). In 1990, the Fourth Circuit firmly rejected the argument that a civilian employer was required to accommodate the military service of employees who were NG&R members only if a court found the resulting burden on the employer to be "reasonable." *Kolkhorst v. Tilghman*, 897 F.2d 1286 (4th Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992).

The Supreme Court granted *certiorari* to resolve this conflict. In a decision by Justice David Souter, the Court unanimously rejected the employer's argument that a "rule of reason" limited the right of employees like King to take unpaid military leave from their civilian jobs for military service:

> The inference that Congress intended no such limits as the hospital espouses is buttressed by a joint House-Senate Conference Committee's disapproval of a shift in position taken by the Department of Labor on this question. *See* United States Department of Labor, *Veterans' Reemployment Rights Handbook* 111 (1970). After *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981), the department adopted the different view that section 2024(d) applied only to leaves of 90 days or less. *See* H.R. Rep. No. 97-782, page 8 (1982). Subsequently, a House-Senate Conference Committee Report announced that the House and Senate Veterans' Affairs Committees "did not agree

> that the 90-day limit was well-founded either as legislative interpretation or application of the pertinent case law." 128 Cong. Rec. 25513 (1982). Coming as it did in the aftermath of Congress' decision to place AGR [Active Guard and Reserve] participants under the coverage of section 2024(d), this statement is decidedly at odds with the hospital's position and confirms the conclusion that the enactment of the AGR program was not intended to modify the ostensibly unconditional application of section 2024(d).

King, 502 U.S. at 222.

The VRRA served our nation well, but by the 1980s numerous piecemeal amendments had made the law confusing and cumbersome. The Department of Labor (DOL) and the Department of Defense (DOD) drafted a proposed new reemployment statute and forwarded it to the White House.

On August 2, 1990, Iraq invaded and quickly occupied Kuwait and threatened Saudi Arabia. President George H.W. Bush drew a "line in the sand" and made clear his determination to protect Saudi Arabia and liberate Kuwait. Part of his response included the first significant call-up of National Guard and Reserve personnel since the Korean War. The call-up focused national attention on perceived deficiencies in laws (including the VRRA) to protect mobilized Guard and Reserve personnel. As a result, President Bush forwarded the DOL-DOD draft to

Congress in February 1991. Both the Senate and House of Representatives acted on the presidential initiative during the 102nd Congress, but the differences between the two versions were not resolved before the end of that Congress.

Near the end of the 103rd Congress, the differences were resolved and the legislation was presented to President Clinton for his signature. On October 13, 1994, he signed the Uniformed Services Employment and Reemployment Rights Act into law.[18]

USERRA's legislative history makes clear that USERRA is not a new law but an improvement upon a law that goes back to 1940:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment related discrimination, and protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. *This is particularly true of the basic principle established by the Supreme*

[18] Pub. L. 103-353, 108 Stat. 3149.

> *Court that the Act is to be 'liberally construed.' See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977).

H.R. Rep. No. 103-65, 1994 *U.S.C.C.A.N.* 2449, 2452.

Like §2021(b)(3) of the VRRA, §4311(a) of USERRA[19] forbids discrimination against persons who seek or hold civilian positions of employment, but §4311(a) is significantly broader in terms of who is protected.[20]

Congress sought to overrule the *dictum* from *Monroe* and the holding in *Sawyer* that the NG&R member challenging a personnel action must prove that anti-military animus was *the sole reason* for the denial of a benefit of employment. Section 4311(c) provides:

> An employer shall be considered to have engaged in actions prohibited – (1) under subsection (a) if the person's membership, application for membership, service,

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[19] 38 U.S.C. §4311(a).

[20] "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. §4311(a).

> application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.

38 U.S.C. §4311(c) (emphasis supplied).

USERRA's legislative history also clearly explains the purpose and effect of §4311.

> Current law protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units (*see Boyle v. Burke*, 925 F.2d 497 (1st Cir. 1991)), or employees who have a military obligation in the future such as a person in the Delayed Entry Program, *Trulson v. Trane Co.*, 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] *intends that these provisions be broadly construed and strictly enforced*. . . .

Section 4311(b) [later renumbered as 4311(c)] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military

> obligation is the sole factor (*see Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.

H.R. Rep. No. 103-65, 1994 *U.S.C.C.A.N.* 2449, 2456-57 (emphasis supplied).

No one has been drafted by the United States since 1973, when Congress abolished the draft and established the All-Volunteer Military (AVM). The Total Force Policy is an integral part of the AVM. The National Guard and Reserve have been transformed from a "strategic reserve" (available only for WWIII) to an "operational reserve" (routinely called to the colors for military operations like the ongoing operations in Iraq and Afghanistan).[21]

Today, the U.S. military is an all-volunteer force. The entire U.S. military establishment, including the National Guard and Reserve, accounts for less than three quarters of one percent of our nation's population. That the numbers are so small (in proportion to our national population more than twice the WWII-era population) only increases the debt

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[21] The Office of the Assistant Secretary for Reserve Affairs in the Department of Defense publishes a weekly report on mobilization of National Guard and Reserve personnel. The report dated June 8, 2010 shows that as of that date 771,048 National Guard and Reserve personnel had been mobilized since the terrorist attacks of September 11, 2001.

that our nation as a whole owes to the few good men and women who serve.[22]

One hopes that the circumstances of the times and sentiments like these were reflected upon in 1946 when Justice Douglas delivered the opinion of this Court and wrote:

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.

Fishgold, 328 U.S. at 285.

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[22] On August 20, 1940, during the Battle of Britain, Prime Minister Winston Churchill said: "The gratitude of every home in our Island, in our Empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few." *Never Give In: The Best of Winston Churchill's Speeches*, edited by Winston S. Churchill (grandson), Hyperion Publishers 2003, page 238. These eloquent words about the Royal Air Force apply equally to the members of the U.S. armed forces today.

ARGUMENT

THE SEVENTH CIRCUIT'S APPLICATION OF THE "CAT'S PAW THEORY" TO USERRA DISCRIMINATION CLAIMS CONFLICTS WITH CONGRESS' INTENT AND THE PLAIN LANGUAGE OF §4311(c)(1).

A court interpreting USERRA shall "liberally construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Id.* The legislative history makes clear that Congress intended that courts interpreting the USERRA continue to honor that maxim. *See* S. Rep. No. 103-158, at 40 (1993); H.R. Rep. No. 103-65, Pt. 1, at 19 (1993); *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[I]nterpretive doubt is to be resolved in the veteran's favor."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991) (recognizing "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.").

Congress has also stated its intent that courts use the burden shifting model from *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) to determine whether an employer discriminated against an employee in violation of USERRA.

See H.R. Rep. No. 103-65, Pt. 1, at 24 (1993), as printed in 1994 *U.S.C.C.A.N.* 2449, 2457; S. Rep. No. 103-158 (1993). In the absence of any indication by Congress that it intended something other than §4311(c)(1) to apply in discrimination claims under the USERRA, the canons of statutory construction must be adhered to and the plain language for §4311 must be followed. *See Hernandez v. Dep't of the Air Force*, 498 F.3d 1328, 1332 (Fed. Cir. 2007); *accord Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003).

Under the USERRA discrimination provision, "[a] person who is a member of [. . .] a uniformed service shall not be denied [. . .] any benefit of employment by an employer on the basis of that membership. §4311(a)." An employee bears the burden of showing by a preponderance of the evidence that his or her USERRA protected status or activity was a motivating factor for the employer's adverse action. §4311(c)(1); 20 C.F.R. §§1002.22, 1002.23(a). The employee is not required to show that the military service was the sole motivating factor. *See Gummo v. Village of Depew, NY*, 75 F.3d 98, 106 (2nd Cir. 1996), *cert. denied*, 116 S. Ct. 1678, 134 L. Ed. 2d 780 (1996); *see NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). All record evidence may be considered to determine whether an

employee's protected status was a motivating factor for the employer's conduct, including the employer's explanation for the actions taken. *Id.* The term "motivating factor" means that if the employer was asked at the moment of the decision what its reasons were and if it gave a truthful response, one of those reasons would be the employee's military position or related obligations. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

The burden of proof shifts to the employer once the employee has met his or her burden. To prevail on the affirmative defense, the employer must *prove* (not just assert) that legitimate reasons, standing alone, would have induced the employer to take the same adverse action anyway. *Sheehan*, 240 F.3d at 1014; 20 C.F.R. §§1002.22, 1002.23(a).

This framework is not unfamiliar to this Court. As stated in *Price Waterhouse v. Hopkins*:

> We have, in short, been here before. Each time, we have concluded that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive. Our decision today treads this well-worn path.

Hopkins, 490 U.S. at 250 (1989).

The framework applies to mixed-motive cases; where an employer defends on the ground that, even

if an invalid reason played a part in the adverse action, the same action would have been taken in the absence of the invalid reason. *Sheehan*, 240 F.3d at 1014. However, proving that "the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *Hopkins*, 490 U.S. at 252-253 (1989) (citing *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416 (1979).) An employer may not prevail in a mixed-motive case by offering a legitimate reason for its decision if that reason did not motivate it at the time of the decision. *Id.* (The very premise of a mixed-motive case is that a legitimate reason was present.) The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision; *e.g.*, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. *Id.*

In sum, only legitimate reasons, *standing alone*, are sufficient for the employer to escape liability. *See Sheehan*, 240 F.3d at 1014; 20 C.F.R. §§1002.22, 1002.23(a); *Transportation Management*, 462 U.S. at 400.

On the other hand, a cat's paw theory of liability applies when an otherwise unbiased employer makes an adverse employment decision that is influenced by the unlawful intent of a subordinate. *See Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908 (7th Cir. 2007). While a cat's paw theory might at first seem to be applicable to a

§4311 claim, it is different. The employer only becomes liable when the subordinate's unlawful intent rises to some particular level of influence. *See id.* at 917. Cat's paw theory is, thus, a framework used to measure what degree of influence a subordinate's unlawful intent had upon the employer's adverse employment decision. *See id.* When that degree of influence rises to a particular level, the subordinate's unlawful intent is imputed to the employer and the employer's objectivity or neutrality is no longer a defense to liability. *See Hill v. Lockheed Martin Logistics Mgmt.*, 314 F.3d 657, 669-670 (4th Cir. 2003). Depending upon the jurisdiction and applicable law, the degree of influence sufficient to establish employer liability ranges from descriptions such as: "play some role" to "singular influence" or "to rely entirely." *Compare Brewer*, 479 F.3d at 917 *and Hill*, 314 F.3d at 669-670 (citing cases with differing degrees of influence and criticizing the use of the terminology).

A cat's paw theory of liability conflicts with the plain language of §4311(c)(1) because there is nothing in the statute to indicate that Congress intended something other than purely legitimate reasons will allow an employer to escape from liability. It is not necessary to measure what degree unlawful influence may have played in an employer's decision, when the employer must show that its decision was made based upon only legitimate reasons. *See* §4311(c)(1). The latter is the only standard by which an employer may escape liability for discrimination. *Id.* Congress did not include the

former, or some other standard. *See id.* The statute is not ambiguous, and, thus, the courts should not construe it to include another standard. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (where the words of the statute are unambiguous, the judicial inquiry is complete); *accord Hernandez v. Dep't of the Air Force*, 498 F.3d at 1332.

Further, §4311 does not contain a requirement that an employee-plaintiff show some particular degree of unlawful intent, or influence, that is necessary to establish employer liability. At the first instance, the employee bears the burden of proving his or her protected status and that the protected status was *a motivating factor, e.g.*, one reason for the employer's decision. *Sheehan*, 240 F.3d at 1014. Accordingly, all record evidence may be considered to determine whether the employee has carried the initial burden. *Id.*

Likewise, once the burdens of production and persuasion are shifted to the employer, it must prove that no unlawful intent infected its decision. USERRA does not allow an employer to escape liability by proving that the degree of unlawful influence bearing on its decision did not rise to a sufficient level. *See id.* A measure of how minimally unlawful intent may have influenced an employer's decision is of no consequence because only legitimate reasons, *standing alone*, are sufficient for the employer to escape liability. *See Sheehan*, 240 F.3d at 1014.

Similarly, because the burden is on the employer to prove no unlawful intent influenced their decision, a liability framework that measures the level of unlawful influence is inconsistent with Congress' stated intent[23] that courts use a burden shifting framework to resolve whether an employee was discriminated against in violation of the USERRA.

The problems and conflicts that will result from applying the cat's paw theory to USERRA discrimination cases are shown in the case at bar. In the district court, the jury verdict form follows in-step with the framework established for §4311(c)(1). First, the jury determined that Mr. Staub did show by a preponderance of the evidence that his military status was a motivating factor in Proctor Hospital's decision to discharge him. Second, the jury determined that Proctor Hospital failed to show by a preponderance of the evidence that Mr. Staub would have been discharged regardless of his military status. That is all that is required by §4311(c)(1) to establish employer liability. Thus, when the jury was asked to render its verdict and fill out its verdict form, it followed the clear mandate of §4311(c)(1). However, a cat's paw instruction was also given.

On appeal, the court looked to that instruction and took a different course of action. It determined that under Seventh Circuit precedent the degree of

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[23] *See* H.R. Rep. No. 103-65, Pt. 1, at 24 (1993), as printed in 1994 *U.S.C.C.A.N.* 2449, 2457; S. Rep. No. 103-58 (1993).

influence required of a subordinate's unlawful intent must rise to the level of singular influence. *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009). Thus, to escape employer liability, "It is enough that the decision maker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision." *Id.* (citations omitted).

In other words, the jury followed the mandate of §4311(c)(1) when it found that Mr. Staub's association with the military was a motivating factor in his discharge. But the Court of Appeals found that is not enough to establish liability under §4311(c)(1) because the cat's paw theory requires "more [. . .] it requires a blind reliance, the stuff of singular influence." *Id.*

That approach imposes a higher burden on the USERRA discrimination plaintiff than is required by the plain language of §4311(c)(1). If that approach is allowed to stand, then employers will be allowed to escape liability even though it is proven that their decisions are partially motivated by an employee's protected status. Application of cat's paw liability theory therefore artificially raises the bar for members of the military who seek protection from discrimination under the USERRA. And, unless this Court rules otherwise, each Circuit will continue to apply its own standards for what degree of influence is needed to impute unlawful intent to an employer. None of this can be gleaned from the plain language of the USERRA, the intent of Congress or the circumstances which gave birth to veterans' reemployment rights.

CONCLUSION

The ROA understands that the cat's paw theory, as espoused by the parties below, arises frequently in employment discrimination cases. This Court need not issue a broad decision on the application of the theory to various kinds of employment cases. It would be sufficient, and consistent with this Court's policy, *e.g.*, *City of Ontario, California v. Quon*, 560 U.S. ___ (June 17, 2010), to decide this case narrowly. To determine that, application of cat's paw theory in this case is inconsistent with the legislative intent and text of USERRA.

Therefore, the ROA requests that this Court reject the application of the theory to USERRA cases and reverse the Seventh Circuit's decision.

Respectfully submitted, July 9, 2010.

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